Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LIFE PARTNERS, INC.,

Petitioner,

v.

THEODORE V. MORRISON, JR., in his official capacity as Commissioner of the Virginia State Corporation Commission, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The McCarran-Ferguson Act removes dormant Commerce Clause restrictions on state laws that regulate the "business of insurance." 15 U.S.C. § 1012(a). Unfortunately, "[d]efining 'insurance' for McCarran-Ferguson purposes has been an enduring problem" for lower courts. *Adams v. Plaza Fin. Co.*, 168 F.3d 932, 942 (7th Cir. 1999) (Easterbrook, J., dissenting). The Fourth Circuit exacerbated this "enduring problem" by holding that a state law purporting to regulate viatical settlements regulates the "business of insurance" under the McCarran-Ferguson Act. The Fourth Circuit reached this conclusion even though viatical settlements do not involve insurance companies. Instead, they are agreements in which an insured sells the right to receive benefits under a previously issued life insurance policy to a third party. The question presented is whether the Virginia Viatical Settlements Act regulates the "business of insurance" under the McCarran-Ferguson Act, notwithstanding the fact that a viatical settlement is not a transaction between an insurance company and an insured.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Mark C. Christie and Judith Williams Jagdmann, in their official capacities as Commissioners of the Virginia State Corporation Commission, and Alfred W. Gross, in his official capacity as Virginia Commissioner of Insurance, were defendants-appellees below and are respondents in this Court; Robert F. McDonnell, in his official capacity as the Attorney General of the Commonwealth of Virginia, was an intervenor-appellee below and is a respondent in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Life Partners Holdings, Inc., is the parent corporation of Life Partners, Inc., and that no other publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Life Partners, Inc., respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 484 F.3d 284. Pet. App. 1a. The order denying the petition for rehearing en banc is unreported. *Id.* at 72a. The opinion of the United States District Court for the Eastern District of Virginia is reported at 420 F. Supp. 2d 452. *Id.* at 39a.

JURISDICTION

The district court had jurisdiction over petitioner's claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on April 30, 2007. It denied petitioner's timely petition for rehearing en banc on May 29, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the McCarran-Ferguson Act (15 U.S.C. § 1012) provides:

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That ... [the Sherman Act, Clayton Act, and Federal Trade Commission Act] shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

The Virginia Viatical Settlements Act is set forth in Appendix D. Pet. App. 75a.

STATEMENT

This case affords the Court the opportunity to provide States and lower courts with much-needed guidance regarding the scope of Section 2(a) of the McCarran-Ferguson Act. 15 U.S.C. § 1012(a). For decades, decisions from this Court and lower courts have confined Section 2(a) to state laws that regulate transactions between an insurer and an insured. In conflict with those decisions, the Fourth Circuit held that the Virginia Viatical Settlements Act regulates the "business of insurance" within the meaning of the McCarran-Ferguson Act, even though the Virginia law does not regulate an insurer-insured transaction but instead regulates a third party's purchase of the right to receive benefits under an existing life insurance policy (a transaction known as a "viatical" or "life" settlement).

The Fourth Circuit's decision expands the scope of the McCarran-Ferguson Act to reach transactions that are only peripheral to the insurer-insured relationship that rests "at the core of the McCarran-Ferguson Act's concern." *Barnett Bank of Marion*

County, N. A. v. Nelson, 517 U.S. 25, 39 (1996). In so doing, it insulates from the dormant Commerce Clause a vast number of state laws that—like the Virginia Viatical Settlements Act—significantly burden or discriminate against interstate commerce. The decision therefore has far-reaching implications not only for the multibillion-dollar viatical and life settlement market, but also for all other companies that provide services to insurers and insureds and that seek to enter into interstate transactions unimpeded by States' extraterritorial regulations. The inevitable result of the Fourth Circuit's holding will be a proliferation of state laws that substantially restrict the ability of terminally ill people and senior citizens to transfer their life insurance benefits in interstate transactions to pay for essential medical care and other end-of-life expenses.

This Court's review is warranted to alleviate the circuits' confusion regarding the definition of the "business of insurance" under Section 2(a) of the McCarran-Ferguson Act and to clarify the scope of the States' authority under that statute to enact otherwise unconstitutional laws that regulate out-of-state business activities only marginally connected to the insurer-insured relationship.

1. The McCarran-Ferguson Act

Congress enacted the McCarran-Ferguson Act in 1945 to ensure that the States' historical primacy in the field of insurance is not undermined by the restrictions that the dormant Commerce Clause imposes on the regulation of interstate commerce or inadvertently supplanted by generally applicable federal laws not enacted with the peculiar concerns of the insurance industry in mind.

Throughout the nineteenth and early twentieth centuries, this Court repeatedly held that "[i]ssuing a policy of insurance [was] not a transaction of commerce" (*Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869)), and the regulation of insurance transactions was therefore thought to rest within the exclusive purview of the States. That understanding was unsettled, however, by this Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944), which held that insurance transactions do constitute commerce and are subject to federal statutes, including the antitrust laws, enacted pursuant to Congress's Commerce Clause authority.

Congress responded to *South-Eastern Underwriters* by enacting the McCarran-Ferguson Act to provide for "the continued regulation and taxation by the several States of the business of insurance." 15 U.S.C. § 1011. Section 2(a) of the McCarran-Ferguson Act states that the "business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business" (*id.* § 1012(a)), and thereby "assure[s] that the States are free to regulate insurance companies without fear of Commerce Clause attack." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 218 n.18 (1979). Section 2(b) of the Act saves state laws "enacted . . . for the purpose of regulating the business of insurance" from preemption by generally applicable federal laws that do not "specifically relate[ ] to the business of insurance." 15 U.S.C. § 1012(b). These provisions "turn[ed] back the clock, to assure that the activities of *insurance companies in dealing with their policyholders* would remain subject to state regulation." *SEC v. Nat'l Sec. Inc.*, 393 U.S. 453, 459 (1969) (emphasis added).

2. The Viatical and Life Settlement Market

Petitioner Life Partners is a viatical and life settlement provider headquartered and licensed to do business in Texas. The viatical settlement industry emerged out of the AIDS crisis of the early 1980s, when terminally ill patients no longer able to support themselves began to look for ways to sell the right to receive benefits under their life insurance policies to third-party purchasers to pay for essential medical care and other end-of-life expenses. Pet. App. 6a.

This Court has long recognized the right of insureds to sell the benefits due under their life insurance policies to third parties as personal property (*see Grigsby v. Russell*, 222 U.S. 149, 156 (1911)), and to enter into such transactions out of state without regulation from their home States. *See N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 376-77 (1918). In a viatical settlement transaction, the insured—known as the "viator"—sells the right to receive benefits due under his life insurance policy to a third-party purchaser at a price below the policy's face value; the purchaser then continues to pay the premium to the insurer, designates itself the policy's beneficiary, and collects the policy's benefit upon the insured's death. Pet. App. 6a. The purchaser, or group of purchasers, typically employs the services of a viatical settlement "provider" to represent it, and pays the provider a fee for facilitating the transaction and providing certain ministerial services related to the policy's administration. *Id.* Life Partners serves as the purchaser's agent when facilitating the purchase of a viatical settlement.

The viatical settlement market has experienced tremendous growth in recent years and has ex-

panded to include not only traditional viatical settlements with insureds who have a life expectancy of less than two years but also "life settlements" with senior citizens who have longer life expectancies. *See* Charles Duhigg, *Late in Life, Finding a Bonanza in Life Insurance*, N.Y. TIMES, Dec. 17, 2006 ("Hedge funds, financial institutions like Credit Suisse and Deutsche Bank, and investors like Warren E. Buffett are spending billions to buy life insurance policies from the elderly."). According to the Fourth Circuit, "[i]t is estimated that $13 billion worth of life insurance policies were sold by policyholders to providers in 2005—up from $5 million in 1989 and $200 million in 1998—and it is projected that by 2030 the number could reach $160 billion." Pet. App. 7a. The federal government itself has stimulated the viatical settlement market by amending the Internal Revenue Code to exclude the proceeds of a viatical settlement from the viator's taxable income. 26 U.S.C. § 101(g)(2).

The growth of this market spurred state efforts to regulate viatical and life settlements to ensure that insureds are treated fairly when selling their policy benefits. Approximately 38 States have enacted various versions of the Viatical Settlements Model Act developed by the National Association of Insurance Commissioners ("NAIC"), or similar model legislation drafted by the National Conference of Insurance Legislators. Pet. App. 8a.

As a business incorporated and headquartered in Texas, Life Partners is subject to the Texas law governing viatical and life settlements. Tex. Ins. Code §§ 1111.001–.053. Together with its implementing regulations, that statute requires Life Partners to obtain a license from the Texas Department of Insurance as a viatical settlement provider (28 Tex.

Admin. Code § 3.1703), submit its settlement contracts to the Department for approval prior to use (*id.* § 3.1706), provide specified disclosures to viators prior to completion of the transaction (*id.* § 3.1709), include specified language in settlement applications and contracts (*id.* § 3.1710), and pay just compensation to viators (*id.* § 3.1710(c)(6)). Life Partners is duly licensed under Texas law and conducts its business in full compliance with the requirements of the Texas statute and regulations.

Life Partners has no offices or employees in Virginia and thus has not obtained a license under the Virginia Viatical Settlements Act, which is based on the NAIC Model Act and imposes requirements on viatical settlement providers that differ in several respects from those under Texas law. Va. Code §§ 38.2-6000 to -6016. The Virginia Act requires registration and annual renewal in order to "act as a viatical settlement provider with a resident of th[e] Commonwealth," and therefore applies to transactions that Virginia residents enter into both inside and outside the Commonwealth. *Id.* § 38.2-6002. To become licensed as a viatical settlement provider by the Virginia State Corporation Commission, a provider must either deposit $100,000 into the Commonwealth's treasury or post a $100,000 surety bond. 14 Va. Admin. Code § 5-71-31. The viatical settlement contracts and disclosure forms used by providers must be submitted to the Commission for review and approval (Va. Code § 38.2-6003), and must include certain language specified by the Act and its implementing regulations. *Id.* § 38.2-6011; 14 Va. Admin. Code §§ 5-71-35, 5-71-90. Advertising by viatical settlement providers is subject to content restrictions, including all "Internet advertising viewed by persons located in th[e] Commonwealth."

Va. Code § 38.2-6010(A). The Act also establishes minimum prices that viatical settlement providers must pay for policies: 80% of the policy's face value where the viator has less than six months to live, 70% of the face value where the viator has at least six but less than twelve months to live, 65% where the viator has at least twelve but less than eighteen months to live, and 60% for a life expectancy of between eighteen and twenty-four months. 14 Va. Admin. Code § 5-71-60.

The onerous registration requirements and artificial price floors established by the Virginia Viatical Settlements Act have greatly diminished the market in viatical settlements with Virginia residents. Between 2001 and 2004, there were, on average, less than two reported viatical settlements transacted each year in compliance with Virginia's regulations. C.A. J.A. 221, 436-37. Only one was transacted in all of 2003 and 2004. *Id.* at 221. By comparison, more than 170 Virginia residents sold the right to receive benefits under their life insurance policies to out-of-state purchasers from 1995 to 2001. *Id.* at 223.

3. Life Partners' Lawsuit

This suit arose out of a viatical settlement transaction between Life Partners and "Jane Doe," a resident of Virginia who is terminally ill with AIDS and who, at the time, was believed to have a life expectancy of six to eighteen months. Pet. App. 4a. Using the Internet, Jane Doe retained a New Jersey-based broker to assist her in identifying a purchaser for her $115,000 life insurance policy. *Id.* at 12a. That broker contacted Life Partners in Texas and asked it to locate purchasers interested in Jane Doe's policy. *Id.* Life Partners assembled a group of twelve purchasers from seven States—none of whom was from Vir-

ginia—willing to bid on the policy, and acted as an agent for those purchasers in the ensuing transaction. *Id.* at 13a.

On behalf of Jane Doe, the New Jersey broker rejected the first two bids received, but finally accepted the third offer of $29,900 (Pet. App. 13a), which "was consistent with the prevailing market prices at the time of the transaction for an individual with her life expectancy." C.A. J.A. 225. Life Partners sent the contract and disclosures mandated by Texas law to Jane Doe in Virginia, who mailed the completed forms back to Life Partners in Texas and thereafter received the agreed-upon funds from an independent Texas escrow agent. Pet. App. 13a.

Five months after the transaction was completed, Jane Doe contacted Life Partners and requested the minimum payment established by the Virginia Viatical Settlements Act, which, depending upon Jane Doe's precise life expectancy, would have been several times higher than the price that Jane Doe initially accepted. Pet. App. 13a. Life Partners declined to pay the additional money requested by Jane Doe on the ground that, as a Texas viatical settlement provider, it was not subject to the minimum price controls set by the Virginia Act. *Id.* It nevertheless offered to rescind the agreement, even though the rescission period under both Texas and Virginia law had lapsed. *Id.* Jane Doe rejected that offer and instead filed a complaint with the Virginia Bureau of Insurance. *Id.*

After an investigation, the Bureau concluded that Life Partners had acted as an unlicensed viatical settlement provider with a Virginia resident. Pet. App. 14a. The State Corporation Commission issued a "rule to show cause" requiring Life Partners

to explain why it had not obtained a Virginia license and threatening it with prosecution in the event of further violations. *Id.*

Life Partners responded by filing suit in the United States District Court for the Eastern District of Virginia seeking a declaratory judgment that, as applied to Life Partners' transaction with Jane Doe, the Virginia Viatical Settlements Act violates the dormant Commerce Clause and an injunction prohibiting the State Corporation Commission from enforcing the Act against it. Pet. App. 14a.

On summary judgment, the district court rejected Life Partners' dormant Commerce Clause challenge, without addressing the Commission's argument that the McCarran-Ferguson Act insulated the Virginia Viatical Settlements Act from the dormant Commerce Clause's restrictions. Pet. App. 70a. The court concluded that the Act "neither discriminates against interstate commerce" nor imposes an undue burden on interstate transactions. *Id.* at 63a.

4. The Decision Below

The Fourth Circuit affirmed on the ground that the McCarran-Ferguson Act shields the Virginia Viatical Settlements Act from dormant Commerce Clause scrutiny, and did not reach the underlying Commerce Clause issue. Pet. App. 5a.

The Fourth Circuit fashioned at least three different, and alternative, standards for determining whether a state law is saved from the dormant Commerce Clause by the McCarran-Ferguson Act.

First, the court held that the Virginia Viatical Settlements Act "relate[s] to the regulation" of the "business of insurance" under Section 2(a) of the McCarran-Ferguson Act because it "regulate[s] the new ordering of the tripartite insurance arrange-

ment involving the insurer, the insured, and the viatical settlement provider." Pet. App. 27a.

Second, the Fourth Circuit drew upon this Court's standard for determining whether a state law is saved from federal preemption by Section (2)(b) of the McCarran-Ferguson Act. Citing *United States Department of Treasury v. Fabe*, 508 U.S. 491 (1993), the court held that the Virginia Viatical Settlements Act was "enacted 'for the purpose of regulating the business of insurance'" within the meaning of Section 2(b) because, whether or not a viatical settlement itself constitutes the "business of insurance," the Virginia Act "'manages' and 'controls' the relationship between the insurer and the insured and is 'aimed at protecting or regulating' that relationship." Pet. App. 30a (quoting *Fabe*, 508 U.S. at 505).

Third, the Fourth Circuit invoked the standard for defining "insurance" under the preemption savings clause of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(b)(2)(A), asserting that "any understanding of the scope of what amounts to the business of insurance must be based on the 'commonsense understanding' of whether the business relates to or affects 'the risk pooling arrangement between the insurer and insured.'" Pet. App. 22a (quoting *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 341-42 (2003)). Finding this standard also to be satisfied, the Court concluded that "the McCarran-Ferguson Act saves the [Virginia Viatical Settlements Act] from any dormant Commerce Clause challenge." *Id.* at 34a.

REASONS FOR GRANTING THE PETITION

"Defining 'insurance' for McCarran-Ferguson purposes has been an enduring problem" for lower courts. *Adams v. Plaza Fin. Co.*, 168 F.3d 932, 942

(7th Cir. 1999) (Easterbrook, J., dissenting). This case is the ideal vehicle for this Court to reconcile the circuits' conflicting interpretations of the McCarran-Ferguson Act and to ensure that States do not invoke the Act to shield laws from the dormant Commerce Clause that regulate business activity only peripheral to the "business of insurance."

The Fourth Circuit's holding that the McCarran-Ferguson Act insulates the Virginia Viatical Settlements Act from the requirements of the dormant Commerce Clause squarely conflicts with decisions from the Fifth, Sixth, and Eighth Circuits limiting the scope of the McCarran-Ferguson Act to state laws that regulate transactions between insurers and insureds. These courts have recognized that only those state laws that "regulat[e] a practice that is an integral part of the policy relationship between the insurer and the insured" are encompassed by the McCarran-Ferguson Act (*Genord v. Blue Cross & Blue Shield of Mich.*, 440 F.3d 802, 808 (6th Cir. 2006)), and that laws pertaining to transactions between an insurer or insured and a third party—such as a health-insurance company's relationship with health-care providers (*Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc.*, 154 F.3d 812, 830 (8th Cir. 1998)) or an automobile insurance company's relationship with manufacturers of automobile parts (*Liberty Glass Co. v. Allstate Ins. Co.*, 607 F.2d 135, 137 (5th Cir. 1979))—do not regulate the "business of insurance." The Virginia Viatical Settlements Act regulates transactions that involve an insured and a third-party viatical settlement provider and from which the insurer itself is excluded. The Fourth Circuit's holding that the Virginia law regulates the "business of insurance" under the McCarran-Ferguson Act therefore cannot be reconciled with the

decisions from other circuits confining the McCarran-Ferguson Act to the regulation of insurer-insured transactions.

The Fourth Circuit's decision is also in direct conflict with this Court's own McCarran-Ferguson jurisprudence. Beginning with *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), this Court has recognized that "the focus" of the term "business of insurance" is "on the relationship between the insurance company and the policyholder" (*id.* at 460), and has therefore excluded from the scope of the McCarran-Ferguson Act state laws that do not regulate the insurer-insured relationship. The Fourth Circuit's holding that transactions between insureds and third-party purchasers represented by viatical and life settlement providers are part of the "business of insurance" expands the McCarran-Ferguson Act well beyond the limitations established in *National Securities* and its progeny.

This Court's review is urgently needed because the Fourth Circuit's decision will have profound implications for the multibillion-dollar viatical and life settlement market—and for the national economy, more broadly. The dormant Commerce Clause ensures the free flow of commerce among the States and prevents States from enacting laws that discriminate against interstate commerce in favor of intrastate transactions. The Fourth Circuit's expansive reading of the McCarran-Ferguson Act, however, shields from dormant Commerce Clause scrutiny any state law that regulates interstate transactions even tangentially connected to the insurance business. Thus, not only does that decision expose transactions between insureds and viatical and life settlement providers to discriminatory and unduly burdensome state laws, but it also potentially re-

moves dormant Commerce Clause restrictions on a vast number of other state laws regulating transactions between insurers or insureds and third parties. In so doing, it authorizes States to impose burdensome restrictions on the ability of terminally ill patients and senior citizens to alienate their insurance benefits to out-of-state purchasers.

This Court should grant certiorari to ensure that States do not utilize the McCarran-Ferguson Act as a basis for enacting parochial laws that impede interstate transactions with only a tenuous link to the "business of insurance."

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS' INTERPRETATIONS OF THE "BUSINESS OF INSURANCE" UNDER THE MCCARRAN-FERGUSON ACT.

The Fourth Circuit's holding that the Virginia Viatical Settlements Act regulates the "business of insurance" within the meaning of the McCarran-Ferguson Act directly conflicts with other circuits' holdings that the "business of insurance" is limited to transactions between an insurer and an insured and does not extend to business transacted with third parties to the insurer-insured relationship.

A. This Court has explained that the "focus" of the "business of insurance" is "on the relationship between the insurance company and the policyholder." *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 460 (1969). On that basis, at least three circuits have held that the McCarran-Ferguson Act does not apply to state laws that regulate transactions that insurers or insureds enter into with third parties.

In *Prudential Insurance Co. of America v. National Park Medical Center, Inc.*, 154 F.3d 812 (8th Cir. 1998), for example, the Eighth Circuit held that

the Arkansas Patient Protection Act, which requires health-insurance companies to include in their plans any health-care provider willing and able to meet the plan's requirements, does not regulate the "business of insurance" within the meaning of the McCarran-Ferguson Act because the Patient Protection Act's "connection to the insurer-insured relationship is attenuated at best." *Id.* at 830 (internal quotation marks omitted). The court emphasized that the Arkansas Act does not "define the terms of the relationship between the insurer and the insured, but only the terms of the relationship between the insurer and a third party, and hence is no more 'integral' to the insurer-insured relationship than any contract an insurer might make with any other third party." *Id.* (internal quotation marks omitted).

Similarly, in *Genord v. Blue Cross & Blue Shield of Michigan*, 440 F.3d 802 (6th Cir. 2006), the Sixth Circuit held that a Michigan statute that regulated the terms of reimbursement agreements between health insurers and health-care providers did not pertain to the "business of insurance" under the McCarran-Ferguson Act, and therefore did not foreclose a claim against an insurer under the federal Racketeer Influenced and Corrupt Organizations Act. *Id.* at 809. The court emphasized that the "reimbursement provisions of the [Michigan] Health Care Act do not have the aim of regulating a practice that is an integral part of the policy relationship between the insurer and the insured" because they are directed at the business relationship between the insurer and third-party health-care providers. *Id.* at 808. "[P]olicyholders are unconcerned with the reimbursement arrangements between Blue Cross and the doctors," the court explained, "so long as they receive medical treatment as contemplated by their

agreement with Blue Cross." *Id.*; *see also Davies v. Centennial Life Ins. Co.*, 128 F.3d 934, 942 (6th Cir. 1997) (a statute does not regulate the "business of insurance" unless it "affect[s] the substantive terms of the contract" between the insurer and insured).

The Fifth Circuit has also recognized the distinction that the McCarran-Ferguson Act draws between the regulation of insurer-insured agreements and the regulation of agreements involving either an insurer or an insured and a third party. In *Liberty Glass Co. v. Allstate Insurance Co.*, 607 F.2d 135 (5th Cir. 1979), the court held that an agreement between automobile insurers and a manufacturer/installer of automobile replacement glass was not exempt from the federal antitrust laws as part of the "business of insurance" under the McCarran-Ferguson Act because "the business of insurance does not encompass agreements between insurers and third party providers of goods and services." *Id.* at 137.

B. The Fourth Circuit's conclusion that the Virginia Viatical Settlements Act regulates the "business of insurance" under Section 2(a) of the McCarran-Ferguson Act is directly at odds with these decisions from the Fifth, Sixth, and Eighth Circuits.

The Virginia Viatical Settlements Act regulates the negotiation and substantive terms of agreements that insureds enter into with third-party purchasers who are strangers to the insurer-insured relationship. Indeed, insurance companies are expressly forbidden from providing viatical settlement services (Va. Code § 38.2-6002(F)), and are not a party to viatical settlement agreements that pertain to policies they have issued. A viatical settlement agreement does not alter the substantive terms of the preexisting insurance contract between the insurer and in-

sured, and—as the D.C. Circuit has held—is not itself "an insurance policy." *SEC v. Life Partners, Inc.*, 87 F.3d 536, 542 (D.C. Cir. 1996). The agreement simply transfers from the viator to the purchaser the right to receive benefits under the existing policy and the obligation to pay premiums on that policy.

It is impossible to reconcile the Fourth Circuit's holding that the Virginia Viatical Settlements Act regulates the "business of insurance" with those decisions in which other circuits have held that only laws that "define the terms of the relationship between the insurer and the insured," rather than the terms of the relationship between the insurer or insured and a third party, regulate the "business of insurance." *Prudential Ins. Co. of Am.*, 154 F.3d at 830 (internal quotation marks omitted). In the Fifth, Sixth, and Eighth Circuits, the insurer-insured relationship is the touchstone of the "business of insurance," and courts in each of those circuits would therefore conclude that the Virginia Viatical Settlements Act (or one of the thirty-seven other state viatical settlements acts) does not regulate the "business of insurance" because it regulates contracts between insureds and third-party purchasers, rather than between insurers and insureds. In direct conflict with the McCarran-Ferguson Act jurisprudence of these circuits, the Fourth Circuit held that the term "business of insurance" is sufficiently broad to encompass transactions between an insured and a third party to the insurer-insured relationship.

This deep division in authority creates intolerable regulatory uncertainty for viatical and life settlement providers. Because "a clear definition of the phrase 'business of insurance' does not exist," viatical and life settlement providers—as well as state regulators and other companies that transact business

with insurers and insureds—are left to guess as to whether a particular commercial transaction with a tangential connection to insurance is encompassed by the McCarran-Ferguson Act. Willy E. Rice, *Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit, and Insurance*, 33 SAN DIEGO L. REV. 583, 660 (1996).

Indeed, while Life Partners has been told by the Fourth Circuit that it is engaged in the "business of insurance" when it facilitates the purchase of an insurance policy from an insured, it has been told by the D.C. Circuit that it is *not* engaged in the "business of insurance" when it represents purchasers taking fractionalized interests in the same transaction. *Life Partners, Inc.*, 87 F.3d at 542. Life Partners has also been told that viatical settlements are not the "business of insurance" by a district court in the Fifth Circuit, *see Life Partners, Inc. v. Life Ins. Co. of N. Am.*, 1998 U.S. Dist. LEXIS 23544, at *8 (W.D. Tex. 1998), *aff'd on other grounds*, 203 F.3d 324 (5th Cir. 1999), and by the Securities and Exchange Commission. *See* Reply Brief in Support of Motion for Preliminary Injunction and Other Provisional Relief at 7, SEC v. Life Partners, Inc. (D.D.C. filed Oct. 28, 1994) (No. 1:94CV01861) ("because the McCarran-Ferguson Act applies only to state laws pertaining to the 'business of insurance,' state laws regulating viatical settlements are not within the Act"). The courts of Texas have also held that viatical settlements are not insurance transactions, and Life Partners has conformed its business to the law of its home State. *See Employers Reinsurance Corp.*

v. Threlkeld & Co. Ins. Agency, 152 S.W.3d 595, 598-99 (Tex. App. 2003).[1]

Life Partners and other viatical and life settlement providers cannot develop long-term business plans and ensure regulatory compliance—and States cannot effectively administer their regulatory programs—in the midst of such legal uncertainty. This Court's review is required to reconcile the lower courts' sharply divergent understandings of the McCarran-Ferguson Act.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S INTERPRETATIONS OF THE "BUSINESS OF INSURANCE" UNDER THE MCCARRAN-FERGUSON ACT.

The decision below not only conflicts with other circuits' interpretations of the McCarran-Ferguson Act, but it also is squarely at odds with this Court's own McCarran-Ferguson jurisprudence. Certiorari is warranted to reconcile the Fourth Circuit's decision with this Court's prior interpretations of the "business of insurance" under the McCarran-Ferguson Act.

A. This Court has repeatedly limited the scope of the McCarran-Ferguson Act to state laws that directly regulate the insurer-insured relationship. In *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), the Court held that an Arizona law requiring the state insurance director to approve the merger of two

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[1] *But see Nat'l Viatical, Inc. v. Oxendine*, 2006 U.S. Dist. LEXIS 25851, at *6 (N.D. Ga. 2006) (rejecting a dormant Commerce Clause challenge to the Georgia Life Settlements Act on the ground that the McCarran-Ferguson Act shields the state statute from the dormant Commerce Clause's requirements), *aff'd without opinion*, 221 F. App'x 899 (11th Cir. 2007).

insurance companies as not "inequitable to the stockholders" did not pertain to the "business of insurance"—and therefore did not render the federal securities laws inapplicable to the merger—because the State was "attempting to regulate not the 'insurance' relationship, but the relationship between a stockholder and the company in which he owns stock." *Id.* at 457, 460.

The Court explained that, in enacting the McCarran-Ferguson Act, "Congress was concerned with the type of state regulation that centers around the contract of insurance." *Nat'l Sec., Inc.*, 393 U.S. at 460. "The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement," the Court continued, are "the core of the 'business of insurance'" under the McCarran-Ferguson Act. *Id.* The Court reasoned that "whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder." *Id.* Because the focus of the Arizona statute was not on the relationship between the insurer and the insured—but rather on the relationship between the insurance company and its stockholders—the Court concluded that it did not regulate the "business of insurance." *Id.*

Similarly, in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), this Court held that agreements between health-insurance companies and pharmacies regarding the price of prescription drugs for the providers' members did not constitute part of the "business of insurance" for McCarran-Ferguson Act purposes and thus were not exempt from the federal antitrust laws. *Id.* at 217. In reaching this conclusion, the Court emphasized that the agreements were not "'between insurer and

insured'" but were instead "separate contractual arrangements between [the insurer] and pharmacies engaged in the sale and distribution of goods and services other than insurance." *Id.* at 216 (quoting *Nat'l Sec., Inc.*, 393 U.S. at 460). The Court explained that "the underwriting or spreading of risk is a critical determinant in identifying insurance" and that the pharmacy agreements did "not involve any underwriting or spreading of risk, but are merely arrangements for the purchase of goods and services by" the insurer. *Id.* at 213-14.

Finally, in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982), the Court synthesized its earlier interpretations of the McCarran-Ferguson Act into a three-part test for determining whether an activity constitutes the "business of insurance": "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Id.* at 129. Employing this standard, the Court held that the activities of a "peer review" committee of chiropractors that advised an insurance company whether chiropractic treatment for which coverage was claimed was "necessary" and "reasonable" did not constitute the "business of insurance" within the meaning of the McCarran-Ferguson Act and were therefore subject to the federal antitrust laws. *Id.* at 134.

The Court explained that the peer-review process did not spread risk because the "transfer of risk from insured to insurer is effected by means of the contract between the parties—the insurance policy—and that transfer is complete at the time that the contract is entered." *Pireno*, 458 U.S. at 130. The Court

also determined that the use of a peer review committee was not an "integral part" of the policy relationship because the "challenged arrangement between [the insurance company] and [the chiropractic association] is obviously distinct from [the insurance company's] contracts with its policyholders." *Id.* at 131. The insurance company's use of the peer-review committee constituted a "separate arrangement between the insurer and third parties not engaged in the business of insurance." *Id.* Lastly, the Court concluded that the peer-review process was not limited to entities within the insurance industry because it "involve[d] third parties wholly outside" that industry. *Id.* at 132.

B. The Fourth Circuit's holding that the Virginia Viatical Settlements Act regulates the "business of insurance" squarely conflicts with this Court's decisions in *National Securities*, *Royal Drug*, and *Pireno*.

Viatical settlement agreements possess none of the indicia of the "business of insurance" that the Court identified in *Pireno* and distilled from its holdings in *National Securities* and *Royal Drug*. Viatical settlement agreements do not spread the viator's risk because risk spreading "is complete at the time that the [insurance] contract is entered." *Pireno*, 458 U.S. at 130. When an insured enters into an insurance contract, he transfers his risk of an early death to the insurance company; that risk remains with the insurance company after the consummation of a viatical settlement agreement, which merely transfers the policy's death benefit to the third-party purchaser.

Moreover, viatical settlements are not an "integral part" of the insurer-insured relationship because—like the merger in *National Securities*, the

pharmacy agreement in *Royal Drug*, and the peer-review process in *Pireno*—they involve a "separate contractual arrangement[ ]" from the insurance contract between the insurer and the insured. *Royal Drug Co.*, 440 U.S. at 216. Viatical settlements are therefore well outside the "focus" of the "business of insurance"—"the relationship between the insurance company and the policyholder." *Nat'l Sec., Inc.*, 393 U.S. at 460; *cf. Pireno*, 458 U.S. at 133 ("Arrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at the center of [the McCarran-Ferguson Act's] legislative concern.").

Furthermore, viatical settlements are not limited to entities within the insurance industry because viatical settlement providers are not insurance companies. Indeed, Virginia law prohibits insurance companies from acting as viatical settlement providers (Va. Code § 38.2-6002(F)) and explicitly acknowledges the distinction between the business of insurance and the business of viatical settlements. *See id.* § 38.2-6000 (referring to "person[s] engaged in the business of viatical settlements *or insurance*") (emphasis added).

The Fourth Circuit's decision disregards each of this Court's guidelines for defining the "business of insurance" by extending the McCarran-Ferguson Act to viatical settlement agreements that do not spread risk, that do not include both the insurer and the insured, and that involve third-party viatical settlement providers who are not part of the insurance industry. This Court's review is warranted to reinforce the limitations on the reach of the McCarran-

Ferguson Act recognized in *National Securities* and its progeny.[2]

C. This Court should also grant review to clarify the relationship between its decisions in *National Securities*, *Royal Drug*, and *Pireno*, on the one hand, and its later decision in *United States Department of Treasury v. Fabe*, 508 U.S. 491 (1993), on the other—an issue with which "[m]any . . . courts have struggled." *Autry v. Nw. Premium Servs., Inc.*, 144 F.3d 1037, 1044 n.5 (7th Cir. 1998).

In *Fabe*, a sharply divided Court held that a state-law provision that gave priority to policyholders in insurance companies' insolvency proceedings was enacted for "the purpose of regulating the business of insurance" within the meaning of Section 2(b) of the McCarran-Ferguson Act and therefore was not preempted by a federal statute giving priority to the federal government's claims. 508 U.S. at 508. The Court explained that "federal law must yield" because the state-law priority provision "further[ed] the interests of policyholders." *Id.* at 502.

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[2] Moreover, the Fourth Circuit's analysis is flawed for the additional reason that it relies, at least in part, on Section 2(b) of the McCarran-Ferguson Act, which saves from federal preemption those state laws enacted "for the purpose of regulating the business of insurance," and on the standard for identifying laws that "regulate insurance" under ERISA's preemption savings clause. This Court has held that it is Section 2(a)—not Section 2(b)—of the McCarran-Ferguson Act that "operates to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack." *Royal Drug Co.*, 440 U.S. at 218 n.18. Furthermore, in *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003), the Court effected a "clean break" between McCarran-Ferguson and ERISA, and held that different standards should be used to define the term "insurance" under each statute. *Id.* at 341.

The Court's focus in *Fabe* on benefit to policyholders in defining the "business of insurance" is in tension with its narrower focus in *National Securities*, *Royal Drug*, and *Pireno* on the insurer-insured relationship and the insurance contract. Indeed, as the dissent in *Fabe* identified, if taken at face value, the Court's decision would mean that "any law which redounds to the benefit of policyholders is, *ipso facto*, a law enacted to regulate the business of insurance." *Fabe*, 508 U.S. at 511 (Kennedy, J., dissenting). That expansive conception of the McCarran-Ferguson Act's scope is difficult to reconcile with this Court's earlier decisions. *See id.* at 512 ("The majority's broad holding is not a logical extension of our decision in *National Securities* and indeed is at odds with it.").

The difficulty that lower courts traditionally experienced defining the "business of insurance" has been exacerbated by *Fabe*'s evident inconsistency with previous interpretations of the McCarran-Ferguson Act. *See, e.g.*, *Int'l Ins. Co. v. Duryee*, 96 F.3d 837, 839 (6th Cir. 1996) ("It is not clear from the majority opinion in *Fabe* how far its holding extends."); *Ruthardt v. United States*, 303 F.3d 375, 381 (1st Cir. 2002) ("If and when the next case reaches the Supreme Court, the dissenting position in *Fabe* could prevail. That position may be closer to the mainstream of prior Court cases on the McCarran-Ferguson Act . . . .").

The lower courts' difficulty implementing *Fabe* is not merely hypothetical. One particularly intractable area of confusion among the lower courts is whether *Fabe* requires application of *Pireno*'s three-part "business of insurance" test when determining whether a law was enacted for "the purpose of regulating the business of insurance" within the meaning

of Section 2(b) of the McCarran-Ferguson Act. *Compare Sabo v. Metro. Life Ins. Co.*, 137 F.3d 185, 191 n.3 (3d Cir. 1998) (holding that the *Pireno* factors do apply), *Genord v. Blue Cross & Blue Shield of Mich.*, 440 F.3d 802, 806 (6th Cir. 2006), *and Blackfeet Nat'l Bank v. Nelson*, 171 F.3d 1237, 1246 n.13 (11th Cir. 1999), *with Autry v. Nw. Premium Servs. Inc.*, 144 F.3d 1037, 1044 n.5 (7th Cir. 1998) (holding that the *Pireno* factors do not apply), *and Doe v. Norwest Bank Minn., N.A.*, 107 F.3d 1297, 1305 n.8 (8th Cir. 1997).

In light of the Fourth Circuit's reliance upon both Sections 2(a) and 2(b) of the McCarran-Ferguson Act in its analysis, this case provides the Court with an ideal opportunity to resolve the widespread confusion regarding the scope of the "business of insurance" under the McCarran-Ferguson Act and to clarify the relationship between *Fabe* and earlier precedent.

III. This Case Raises An Issue Of Exceptional Importance To The Viatical And Life Settlement Market.

This case has profound ramifications for the viatical and life settlement market and for thousands of other businesses—from health-care providers, pharmacies, and nursing homes, to autobody repair shops and manufacturers of automobile parts—that contract with insurers and insureds in the life, health, and automobile insurance contexts. The Fourth Circuit's decision extends the McCarran-Ferguson Act to encompass state laws that regulate businesses with only a peripheral connection to the insurance industry, and shields such laws—no matter how discriminatory or burdensome—from dormant Commerce Clause scrutiny. The implications of that decision for the multibillion-dollar viatical and life set-

tlement market—and for interstate commerce, more broadly—are far-reaching and potentially devastating.

The dormant Commerce Clause "protects free trade among the States" (*Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)) by "prohibit[ing] certain state actions that interfere with interstate commerce." *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992). The McCarran-Ferguson Act, however, "remove[s] all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance." *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653 (1981). The Fourth Circuit's holding that the Virginia Viatical Settlements Act regulates the "business of insurance" under the McCarran-Ferguson Act therefore exposes viatical settlement providers to all manner of state laws discriminating against out-of-state providers and burdening the interstate viatical and life settlement market.

Under the Fourth Circuit's expansive interpretation of the McCarran-Ferguson Act, for example, there would be no constitutional impediment to Virginia enacting a tax that required out-of-state viatical and life settlement providers to pay a higher rate than in-state providers or that provided in-state companies with certain deductions not available to their out-of-state counterparts. And, beyond the viatical and life settlement context, Virginia could impose blatantly discriminatory taxes on any out-of-state company engaged in a business tangentially related to an insurance product. Such discriminatory taxes would be flatly unconstitutional under the dormant Commerce Clause. *See Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 192 n.6 (1995) (this Court has "never upheld a tax in the face of a

substantiated charge that it provided credits for the taxpayer's payment of in-state taxes but failed to extend such credit to payment of equivalent out-of-state taxes"). Under the Fourth Circuit's reading of the McCarran-Ferguson Act, however, those taxes would be completely insulated from the dormant Commerce Clause's requirements.

The Virginia Viatical Settlements Act has an effect on interstate commerce that is equally as pernicious as the effect of the discriminatory taxes hypothesized above. The Act imposes extensive licensing requirements—including a requirement that a viatical settlement provider post a $100,000 bond with the Commonwealth and pay annual license renewal fees—upon any viatical settlement provider that does business with a Virginia resident, even if the provider has no other contacts with the Commonwealth and the Virginia resident enters into the viatical settlement while in another State. Va. Code § 38.2-6002; 14 Va. Admin. Code § 5-71-31. There is also a significant likelihood that the requirements that Virginia imposes on out-of-state viatical settlement providers will conflict with the requirements imposed on the provider by the laws of the State in which it is headquartered. For example, Texas law prohibits providers from facilitating purchases from a seller represented by a broker who does not owe its sole fiduciary duty to the seller. 28 Tex. Admin. Code § 3.1711. Virginia law provides, however, that, in all but a few rare circumstances, a broker does not serve as the seller's fiduciary. Va. Code § 38.2-6000; 14 Va. Admin. Code § 5-71-50. These conflicting laws effectively preclude a Texas provider from representing parties who wish to purchase the life insurance benefits of a Virginia resident.

Such impediments to interstate commerce are squarely prohibited by the dormant Commerce Clause, which "prevent[s] a State from retreating into economic isolation" (*Jefferson Lines, Inc.*, 514 U.S. at 180) by imposing unwarranted burdens on interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The burden imposed by the Virginia Viatical Settlements Act is evident from the fact that the Act has largely extinguished the Virginia market for viatical settlements, reducing to single digits the average number of settlements executed each year. C.A. J.A. 221, 436-37. Because there are no viatical settlement providers headquartered in Virginia, this burden directly and substantially impacts terminally ill Virginia residents seeking to alienate the benefits of their life insurance policies in interstate commerce to pay for essential medical care and other end-of-life expenses. *Id.* at 188.

It is therefore exceptionally important to the viatical and life settlement market—as well as to the millions of senior citizens who may desire to sell their policy benefits and the financial institutions that have already invested billions of dollars in alienated life insurance policies—that this Court review the Fourth Circuit's conclusion that the Virginia Viatical Settlements Act falls within the scope of Section 2(a) of the McCarran-Ferguson Act. In the absence of review, the industry's interstate transactions will continue to be subject to onerous—and conflicting—state-law requirements that have little to do with the regulation of the "business of insurance" and that are far removed from the type of laws that Congress intended to shield from the dormant Commerce Clause when it enacted the McCarran-Ferguson Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 27, 2007

APPENDIX A

LIFE PARTNERS, INCORPORATED,
Plaintiff–Appellant,

v.

Theodore V. MORRISON, Jr.; Mark C. Christie, in their official capacities as Commissioners of the State Corporation Commission; Alfred W. Gross, in his official capacity as the Commissioner of Insurance; Judith Williams Jagdmann, in her official capacity as Commissioner of the State Corporation Commission, Defendants–Appellees,

Robert F. McDonnell, in his official capacity as the Attorney General of the Commonwealth of Virginia, Intervenor–Appellee,

and

Clinton Miller, in his official capacity as Commissioner of the State Corporation Commission, Defendant.

National Association of Insurance Commissioners; North American Securities Administrators Association, Incorporated, Amici Supporting Appellees,

and

Viatical Settlement Professionals, Incorporated, Movant.

Life Partners, Incorporated,
Plaintiff–Appellee,

v.

Theodore V. Morrison, Jr.; Mark C. Christie, in their official capacities as Commissioners of the State Corporation Commission; Alfred W. Gross, in his official capacity as the Commissioner of Insurance; Judith Williams Jagdmann, in her official capacity as Commissioner of the State Corporation Commission, Defendants–Appellants,

and

Clinton Miller, in his official capacity as Commissioner of the State Corporation Commission, Defendant,

and

Robert F. McDonnell, in his official capacity as the Attorney General of the Commonwealth of Virginia, Intervenor–Defendant.

North American Securities Administrators Association, Incorporated; National Association of Insurance Commissioners, Amici Supporting Appellants,

and

Viatical Settlement Professionals, Incorporated, Movant.

Nos. 06–1370, 06–1371.

United States Court of Appeals,
Fourth Circuit.

Argued Nov. 30, 2006.

Decided April 30, 2007.

ARGUED: Douglas Michael Palais, Leclair Ryan, P.C., Richmond, Virginia, for Appellant/Cross–Appellee. Maureen Riley Matsen, Office of the Attorney General of Virginia, Richmond, Virginia; Robert A. Dybing, Thompson & McMullan, Richmond, Virginia, for Appellees/Cross–Appellants. **ON BRIEF:** Cameron S. Matheson, Leclair Ryan, P.C., Richmond, Virginia; Lee E. Goodman, Robert P. Howard, Leclair Ryan, P.C., Washington, D.C., for Appellant/Cross–Appellee. Faisal S. Qureshi, Thompson & McMullan, Richmond, Virginia; Ronald N. Regnery, Office of the Attorney General of Virginia, Richmond, Virginia; Philip R. de Haas, William H. Chambliss, Pamela B. Beckner, Scott A. White, State Corporation Commission of Virginia, Richmond, Virginia, for Appellees/Cross–Appellants. Rex A. Staples, Stephen W. Hall, Lesley M. Walker, North American Securities Administrators Association, Inc., Washington, D.C., for North American Securities Administrators Association, Incorporated, Amicus Supporting Appellees/Cross–Appellants. Elizabeth Mason Horsley, Williams Mullen, P.C., Richmond, Virginia, for National Association of Insurance Commissioners, Amicus Supporting Appellees/Cross–Appellants.

Before NIEMEYER, MICHAEL, and TRAXLER, Circuit Judges.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge MICHAEL and Judge TRAXLER joined.

OPINION

NIEMEYER, Circuit Judge.

We decide, in this case of first impression, whether the Virginia Viatical Settlements Act, Va. Code Ann. § 38.2–6000, *et seq.*, which regulates viatical settlements with insureds who are residents of Virginia, is saved from the dormant Commerce Clause of the U.S. Constitution by the McCarran–Ferguson Act, 15 U.S.C. §§ 1011, 1012, as a state law that "relates to" the regulation of the business of insurance or as a state law enacted "for the purpose of regulating the business of insurance."

"Jane Doe," a terminally ill resident of Virginia with 6 to 18 months to live, sold her life insurance policy to Life Partners, Inc., a Texas corporation, at a deep discount to provide her with cash needed for the remaining months of her life. This transaction, known as a "viatical settlement," is purportedly regulated by Virginia to protect its residents who, in the vulnerable circumstances of being terminally ill, might find it necessary to sell their life insurance policies.

Following the transaction, Jane Doe sought to improve the sale price of her policy by invoking the minimum pricing provisions of the Virginia Viatical Settlements Act. Life Partners, contending that the Virginia Act violated the dormant Commerce Clause, commenced this action to declare the Act unconstitutional and to enjoin its enforcement. Virginia defended the Act as serving a legitimate and important local interest in regulating viatical settlements with its residents. Virginia also argued that, in any event, it properly acted pursuant to the commerce power conferred on it by the McCarran–Ferguson Act, which authorizes States to enact

laws relating to or for the purpose of regulating the business of insurance.

On cross-motions for summary judgment, the district court entered judgment for Virginia, holding that the Virginia Viatical Settlements Act did not violate the dormant Commerce Clause. Relying on the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), the district court concluded (1) that the Virginia Viatical Settlements Act did not discriminate against interstate commerce; (2) that the Act served a legitimate and important local purpose; and (3) that any burden on commerce was only incidental.

On appeals by both parties, we conclude that the sale of life insurance policies by terminally ill patients directly and substantially affects the business of insurance and that the Virginia Viatical Settlements Act "relates to" such business and was enacted "for the purpose of regulating" such business. The McCarran–Ferguson Act thus saves the Virginia Act from preemption of the Commerce Clause and renders it constitutional. Based on this conclusion, we affirm.

I

A "viaticum" in ancient Rome was a purse containing money and provisions for a journey. A viatical settlement, by which a dying person is able to acquire provisions for the remainder of his life's journey by selling his life insurance policy, is thus thought to provide a viaticum. In the language of the industry, the insured is the "viator," who sells his policy at a discount

to a "provider" of the viaticum. The viatical settlement provider is often backed by investors under arrangements reached between the provider and the investors. Once a viator sells a policy to a provider, the provider assumes the responsibility for paying the premiums and designates itself as the beneficiary of the policy. Upon the viator's death, the provider collects the face value of the policy, and the provider's profit is the difference between the face value of the policy and the amount paid to the viator, premiums paid to the insurance company, and the administrative expenses incurred. Because the sooner the viator dies the greater the provider's profit, a provider takes special care in calculating a viator's life expectancy by hiring an independent doctor to examine the insured and his medical records and by monitoring the viator's health until death.

The viatical settlements industry was born in the 1980s in response to the AIDS crisis. In the early years, AIDS was a rapidly fatal disease, and its victims usually died within months of diagnosis. Many AIDS sufferers were in great need of cash to pay for their care after they had become debilitated. Their life insurance policies were not only expensive to maintain but could, upon liquidation, provide some of the desperately needed cash. Moreover, investors were willing to purchase the life insurance policies of AIDS sufferers. Inasmuch as AIDS sufferers had predictably short life expectancies, their policies were reliable investments. *See generally*, Liza M. Ray, Comment, *The Viatical Settlement Industry: Betting on People's Lives is Certainly No "Ex-*

acta," 17 J. Contemp. Health L. & Policy 321, 321–22 (2000); Joy D. Kosiewicz, *Comment, Death for Sale: A Call to Regulate the Viatical Settlement Industry*, 48 Case W. Res. L. Rev. 701, 704 (1998).

The viatical settlements market expanded to include other terminal illnesses, especially as AIDS became a more treatable disease. People suffering from cancer, heart disease, Alzheimer's disease, and other progressive illnesses, as well as elderly people in need of funds for assisted living, found viatical settlements a useful source of immediate cash. Today, the industry is growing exponentially as investors seek out not only the terminally ill, but the swelling ranks of generally healthy, elderly Americans. It is estimated that $13 billion worth of life insurance policies were sold by policyholders to providers in 2005—up from $5 million in 1989 and $200 million in 1998—and it is projected that by 2030 the number could reach $160 billion. *See* Holman W. Jenkins, Jr., *Life Insurers Face the Future, Grudgingly*, Wall St. J., Aug. 9, 2006, at A11; Liam Pleven & Rachel Emma Silverman, *Investors Seek Profit in Strangers' Deaths*, Wall St. J., May 2, 2006, at C1; *see generally* Miriam R. Albert, *The Future of Death Futures: Why Viatical Settlements Must Be Classified as Securities*, 19 Pace L. Rev. 345, 353–55 (1999).

The need for regulating the business of viatical settlements became apparent from the beginning. The power imbalance between the viator and the provider creates a substantial potential for abuse. The viator is usually in a weakened physical condition, often facing im-

minent death, often in financial hardship due to medical and healthcare costs, and often ignorant of industry practices. The provider, on the other hand, has extensive resources, is usually backed by investors, and is armed with sophisticated industry knowledge. Moreover, because of his illness and lack of time and energy to "comparison shop" for the best payment, a viator often agrees to sell at a drastically reduced price, particularly when he fails to understand the nature and value of the rights that he has in the insurance policy that he is selling. The potential for harassment of the viator after the sale is also real, as the providers, acting under the terms of the viatical settlement, closely monitor the viator's health, subjecting him to regular medical examinations. In addition, the life insurance industry began to face new risks, including the increased risk of fraud, as potential insureds sought to hide their illnesses in order to obtain policies and thereafter to sell them to viatical settlement providers. Finally, many have questioned the ethics of an industry whose profits depend on, and whose investors hope for, the early death of its customers.

Because of the need to protect viators and to create a transparent and fair viatical settlements market, the National Association of Insurance Commissioners developed the Viatical Settlements Model Act in 1993 and Viatical Settlements Regulations in 1994 to guide States in their regulation of the viatical settlements industry. To date, approximately 38 States, including Virginia, have adopted a version of the Model Act or similar legislation.

The Virginia Viatical Settlements Act (sometimes hereafter the "Act") was enacted in 1997 to address Virginia's concern with the "potential for exploitation of vulnerable and seriously ill individuals." Legislative Summary, House Bill 871 (Va. 1997). The Commissioner of Insurance for the Bureau of Insurance of the Virginia State Corporation Commission, the state agency charged with implementing and enforcing the Act, stated that some of the Act's specific objectives and purposes include "ensuring that entities providing viatical settlement services are licensed, operated by persons of good character, and do not engage in illegal, unfair or unethical conduct" and "ensuring that fair compensation be paid to viators."

Thus, the core provisions of the Act ensure that providers are reliable; require full disclosures to viators; protect the privacy of viators; establish minimum prices for policies; and prohibit fraud.

More particularly, the Act requires that brokers (defined as viators' agents) and providers be licensed if they contract with a Virginia resident in connection with a viatical settlement. Va. Code Ann. §§ 38.2–6002, –6003. The Act provides that before issuing a license to a provider, the State Corporation Commission is required to investigate the applicant to ensure it is "competent and trustworthy," "indicates its intention to act in good faith within the confines of the license," "has a good business reputation," and "has provided an antifraud plan." *Id.* § 38.2–6002(D). The Act also requires providers to "be bonded" or submit to

"other mechanisms for financial accountability" adopted by the Commission. *Id.* § 38.2–6002(I).

The Act imposes extensive disclosure obligations on providers. For instance, providers must disclose to viators, among other things, the "possible alternatives to viatical settlement contracts including any accelerated death benefits or policy loans offered under the viator's life insurance policy"; the tax consequences of selling the policy; the right of a viator to rescind a viatical settlement for 15 days after receipt of the proceeds; the fact that entering into a viatical settlement may cause a viator to forfeit rights and benefits under the policy; the fact that the provider may require medical visits as frequently as once a month to determine the viator's health status; and the possible loss of coverage for third parties if the life insurance policy involves family riders or includes coverage of a life other than the viator's. *See* Va. Code Ann. § 38.2–6007.

Section 38.2–6005 of the Act is devoted to the protection of a viator's privacy and the confidentiality of information about the viator. *See also* Va. Code Ann. § 38.2–6008(A)(1)(b), (B), (F).

The Act requires providers to pay a viator a minimum percentage of the face value of the insurance policy sold, depending upon the viator's life expectancy. Thus, if the viator's life expectancy is less than 6 months, he must be paid a minimum of 80% of the policy's face value; if his life expectancy is at least 6 but less than 12 months, then he must be paid at

least 70% of the policy's face value; if his life expectancy is at least 12 but less than 18 months, he must be paid at least 65% of the policy's face value; and if his life expectancy is at least 18 but less than 25 months, he must be paid at least 60% of the policy's face value. *See* 14 Va. Admin. Code § 5–71–60(A) (2006).

And the Act contains several provisions prohibiting false or misleading advertising, Va. Code Ann. § 38.2–6010; prohibiting fraud in connection with viatical settlements, *id.* § 38.2–6011; and making violations of the Act unfair trade practices, *id.* § 38.2–6013.

Other miscellaneous provisions designed to protect Virginia viators are also included in the Act, such as a requirement that providers submit to the Commission all viatical settlement contracts for review and approval before closing. Va. Code Ann. § 38.2–6003(A). Funds must be paid to the viator within three business days after the viatical settlement provider has received the insurer's acknowledgment that the beneficiary of the life insurance policy has been changed. *Id.* § 38.2–6007(A)(6). Before entering into a viatical settlement contract, a provider must obtain "a written statement from a licensed attending physician that the viator is of sound mind and under no constraint or undue influence to enter into a viatical settlement contract." *Id.* § 38.2–6008(A)(1)(a).

Finally, we note that the Act does not regulate the relationship between viatical settlement providers and their investors, a relation-

ship that is most often regulated by securities laws. *See* Va. Code Ann. § 38.2–6016.

II

"Jane Doe," a resident of Martinsville, Virginia, who was terminally ill with AIDS, began in March 2004 to explore ways to liquidate her life insurance policy. Her policy had a face value of $115,000 and contained no accelerated death benefit of any value.

Researching on the Internet, Doe located two brokers—Ideal Settlements, Inc., located in New Jersey, and Individual Benefits, Inc., located in North Carolina—and signed brokerage contracts with both. Ultimately, however, she chose Ideal Settlements to negotiate on her behalf. Ideal Settlements contacted Life Partners, located in Waco, Texas, inviting a bid for Doe's life insurance policy.

Life Partners engages nationally in the business of viatical settlements. It locates investors to provide the money, and it negotiates with viators or their brokers for the purchase of life insurance policies. Its profits and those of the investors are determined by the difference between (1) the face amount of the policy paid upon the viator's death and (2) the cost of the policy, the cost of paying premiums until death, and administrative expenses. While Life Partners is licensed as a viatical settlement provider under Texas law, it is not so licensed in Virginia.

Life Partners hired an independent physician to assess Jane Doe's medical condition, and the physician determined that Doe had a life expectancy of 6 to 18 months. Life Part-

ners also located 12 investors from 7 States—none from Virginia—who, acting as a group, were interested in bidding on Doe's policy. On behalf of these purchasers, Life Partners submitted a bid to Ideal Settlements in the amount of $26,000. When Doe rejected that offer, Life Partners raised the bid to $27,000, which Doe also rejected. Life Partners then submitted a final bid of $29,900 which Doe accepted. The bid represented 26% of the face value of Jane Doe's policy.

Life Partners sent the necessary forms, disclosures, and other information required by Texas law to Doe for her review and signature. Doe completed the forms and executed the viatical settlement, returning them to Life Partners for final review and execution in Texas. Life Partners closed the transaction in Texas on May 13, 2004, and wired $29,900 to Doe in Virginia.

Five months later, on October 11, 2004, Doe contacted Life Partners demanding that it pay her more money, based on the Virginia Viatical Settlements Act. That Act would have required Life Partners to pay Doe at least $69,000, and maybe more, depending on the applicable range of life expectancy. Life Partners refused her demand but offered to rescind the transaction, even though the period for rescission had expired. Doe refused rescission and instead filed a complaint with the Virginia Bureau of Insurance, the relevant enforcement arm of the State Corporation Commission.

The Bureau of Insurance conducted an inquiry and concluded that Life Partners had

acted as an unlicensed viatical settlement provider with a Virginia resident. At the request of the Bureau of Insurance, the Virginia State Corporation Commission issued a "rule to show cause" against Life Partners, requiring it to explain why it was conducting business with a Virginia resident without proper licensing, in violation of Virginia law. It also warned Life Partners that unless it subjected itself to Virginia's regulatory regime, Life Partners would be barred from making any further purchases from Virginia residents, under threat of prosecution for a "knowing and willful violation of the law."

On May 26, 2005, Life Partners commenced this action under 42 U.S.C. § 1983, asserting that the State Corporation Commission and the Bureau of Insurance (herein jointly, "Virginia" or the "Commission") violated the dormant Commerce Clause of the United States Constitution by attempting to enforce the Virginia Viatical Settlements Act against Life Partners. Life Partners' dormant Commerce Clause challenge was particularly grounded on the jurisdictional provision of the Virginia Act which gave the Commission oversight authority over all viatical settlements involving Virginia viators. Life Partners contended that this scope of jurisdiction rendered Virginia's regulatory control so broad that it affected commerce occurring wholly outside of Virginia. It also argued that Virginia's regulatory regime, in particular the licensing requirement and price controls, discriminated against and burdened interstate commerce.

Life Partners filed a motion for summary judgment based on its dormant Commerce Clause challenge, and the Commission filed a cross-motion for summary judgment, contending that it had an important and legitimate interest in regulating viatical settlements and that its law had only incidental effects on commerce. The Commission also argued that Congress had explicitly authorized state regulation of viatical settlements in the McCarran–Ferguson Act, a statute that delegates to the States Congress' commerce power to regulate the insurance industry.

The district court granted the Commission's motion for summary judgment and denied Life Partners' motion, agreeing with the Commission that the Act did not violate the dormant Commerce Clause. The court conducted a full Commerce Clause analysis, concluding that Virginia's regulation of viatical settlements comfortably survived the scrutiny. The district court declined to reach the Commission's argument that Congress had authorized States to regulate viatical settlements with the McCarran–Ferguson Act.

These cross-appeals followed. Life Partners challenges the district court's holding that the Virginia Act does not violate the dormant Commerce Clause, and the Commission challenges the district court's failure to address its argument based on the McCarran–Ferguson Act. The Commission contends also that the district court should have abstained in favor of Commission proceedings, under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

III

Because we conclude that in the McCarran–Ferguson Act, Congress delegated its commerce power to Virginia in sufficiently broad terms to cover viatical settlements, thereby saving the Virginia Viatical Settlements Act from any dormant Commerce Clause challenge, we need not decide whether, in the absence of such delegation, the Act would violate the dormant Commerce Clause.

Through the McCarran–Ferguson Act or any other act, Congress holds the authority to "redefine the distribution of power over interstate commerce" by "permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945); *see also Northeast Bancorp, Inc. v. Bd. of Governors*, 472 U.S. 159, 174, 105 S.Ct. 2545, 86 L.Ed.2d 112 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause"). Thus, if the McCarran–Ferguson Act authorizes the States to regulate viatical settlements, the issue of whether the Virginia Viatical Settlements Act burdens interstate commerce becomes irrelevant. We therefore address whether the Virginia Act falls within the scope of the McCarran–Ferguson Act.

The McCarran–Ferguson Act was passed in 1945 in reaction to the Supreme Court's decision in *United States v. South–Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88

L.Ed. 1440 (1944). Prior to that decision, it had been understood that "[i]ssuing a policy of insurance [was] not a transaction of commerce." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183, 19 L.Ed. 357 (1868). Consequently, "the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978). Before *South-Eastern Underwriters*, the States regulated the insurance business free from any concerns arising under the dormant Commerce Clause, and federal statutes, such as the Sherman Act, were thought to be inapplicable to the insurance industry. *See SEC v. Nat'l Securities, Inc.*, 393 U.S. 453, 457–58, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969). In *South-Eastern Underwriters*, the Supreme Court altered this understanding by holding that the business of insurance was a part of interstate commerce and therefore subject to the Commerce Clause and federal enactments based on the Commerce Clause, such as the Sherman Act. *South-Eastern Underwriters*, 322 U.S. at 552–53, 64 S.Ct. 1162.

Congress reacted by enacting the McCarran--Ferguson Act the very next year. Making its mission unmistakably clear, Congress declared "that the continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011. Shortly thereafter, the Supreme Court stated, "obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co.*

v. Benjamin, 328 U.S. 408, 429, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946). The McCarran–Ferguson Act achieved this purpose "by removing obstructions which might be thought to flow from [Congress'] own power, whether dormant or exercised," and "by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects." *Id.* at 430, 66 S.Ct. 1142.

To understand the McCarran–Ferguson Act as it might apply in this case, we start with "the language of the statute itself." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979).

The substantive portions of the McCarran–Ferguson Act are found in its first two sections. The first provides:

> The Congress hereby declares that *the continued regulation and taxation by the several States of the business of insurance is in the public interest*, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011 (emphasis added). And the second provides:

> (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to *the laws of the several States which relate to the regulation or taxation of such business.*

> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede *any law enacted by any State for the purpose of regulating the business of insurance*, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That [the federal antitrust laws] shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Id. § 1012 (emphasis added). Section 1011 thus declares that the "business of insurance" continues to be subject to regulation by the States, as had been the case before *South-Eastern Underwriters*. Section 1012(a) then confers the federal commerce power on the States to enact laws which "relate" to the regulation of the business of insurance, and § 1012(b) restricts federal authority so that no federal law can be construed to "invalidate, impair, or supersede" any state law enacted "for the purpose of" regulating the business of insurance—unless the federal law does so explicitly. By so restricting federal authority, § 1012(b) also defines the scope of state authority, implicitly authorizing States to enact laws "for the purpose of" regulating the business of insurance. *See U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 504, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993) (explaining that § 1012(b) "was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance").

In short, the McCarran–Ferguson Act "declares" that regulation of the business of insurance belongs with the States, and to implement that declaration, the Act explicitly protects from a dormant Commerce Clause challenge (1) any state law that "*relates* to the regulation of the business of insurance" or (2) any state law "enacted *for the purpose* of regulating the business of insurance." The Act reserves from its operation only the federal antitrust laws. 15 U.S.C. § 1012(b).

Important to a proper application of these provisions is an understanding of the terms (1) "insurance," (2) the "business of insurance," (3) the nature of laws that "relate to" or are enacted "for the purpose of" regulating the business of insurance, and (4) the historical context in which Congress enacted the McCarran–Ferguson Act.

A contract of insurance is one by which an insured transfers risks to an insurer for the payment of a premium. *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 130, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982). And so, under a life insurance policy, the insured purchases a hedge against his early death by the insurer's commitment to pay the face amount of the policy. Because the insurer must pay the insured's beneficiary even upon an early death, the insurer takes the bet that the insured will not die before the premiums and investment income accumulate to exceed the face amount of the policy. The cost of the insured's risk, represented by the amount of premiums, is calculated so as to match the anticipated pre-

mium amount with the anticipated payout plus a profit.

Thus, both parties to an insurance contract have a large array of factors to consider in determining whether to enter into a contract of insurance. The insurer considers, among other things, the insured's age and life expectancy, health, work, healthcare and life habits, family history, and similar data from its relevant pool of insureds. The insurer also considers the market for the investment of premiums, data from the pool of insureds relating to the lapsing and early surrender of policies, and marketing, selling, and administrative expenses. The insured, on the other hand, considers, among other things, the insurer's financial strength, its history of honoring policies, its investment record, the risk represented by the relevant pool of insureds, and the insurer's service. But in the end, *both parties* enter into the contract of insurance with the hope that the insured will not die early. That hope is reflected in the insurer's acceptance of the bet that the insured will not die before premiums and investment income at least equal the face amount of the policy, and that hope is inherent in the insured's will to live as part of human nature.

The "business of insurance" refers to the marketing, selling, entering into, managing, servicing, and performing of insurance contracts. *See National Securities*, 393 U.S. at 460, 89 S.Ct. 564 (explaining that in the McCarran–Ferguson Act, "Congress was concerned with the type of state regulation that centers around the contract of insurance," in-

cluding "the type of policy which could be issued, its reliability, interpretation, and enforcement"). Thus, "[t]he relationship between insurer and insured," which is the heart of the insurance contract, is also at "the core of the business of insurance." *See id.* ("Whatever the exact scope of the statutory term ['business of insurance'], it is clear where the focus was—it was on the relationship between the insurance company and the policyholder"). In applying these principles, the Supreme Court has distinguished state statutes that regulate the merger of insurance companies, which are aimed at "the relationship between a stockholder and the company in which he owns stock," from statutes that directly affect contracts of insurance, their risks, and their performance. *See National Securities*, 393 U.S. at 460, 89 S.Ct. 564 (explaining that even though the state merger statute only applied to insurance companies, "[t]he crucial point is that here the State has focused its attention on stockholder protection; it is not attempting to secure the interests of those purchasing insurance policies"). Thus, at bottom, any understanding of the scope of what amounts to the business of insurance must be based on the "commonsense understanding" of whether the business relates to or affects "the risk pooling arrangement between the insurer and insured." *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 341–42, 123 S.Ct. 1471, 155 L.Ed.2d 468 (2003) (examining the scope of the business of insurance in determining whether, under ERISA, a state law regulates insurance);

see also Pireno, 458 U.S. at 129, 102 S.Ct. 3002.

Finally, we understand that the McCarran–Ferguson Act confers more commerce power to the States than is necessary simply to regulate the business of insurance directly. The grant of power sweeps more broadly, giving States the power to enact laws that "relate to" the regulation of the business of insurance or are enacted "for the purpose of" regulating the business of insurance. *See Fabe*, 508 U.S. at 504, 113 S.Ct. 2202 ("The broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that ... necessarily encompass[ ] more than just the 'business of insurance'"). This grant of power to the States was deliberately broad "to allay fears" about the "widely perceived ... threat to state power" that followed the Supreme Court's decision in *South–Eastern Underwriters*. *See Fabe*, 508 U.S. at 499–500, 113 S.Ct. 2202; *see also Prudential Ins. v. Benjamin*, 328 U.S. 408, 429–30, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946).

IV

With this understanding of the McCarran–Ferguson Act, we now turn to address whether the Virginia Viatical Settlements Act is protected from a dormant Commerce Clause challenge as a state law that *relates to* or was enacted *for the purpose of* regulating the business of insurance.

While obvious, it must first be stated that the subject of every viatical settlement is an insurance policy. Moreover, the viatical settlement is not collateral to the policy. Rather,

it modifies it, changing the parties' obligations and benefits, while yet leaving the insurance—i.e., the transfer of the specified risk—in place. At its essence, a viatical settlement is a transaction that fractures the two-part insurance contract between the insurer and the insured and creates a new tripartite arrangement (albeit not a three-party agreement) among the insurer, the insured, and the insured's assignee—the viatical settlement provider. Because of this new tripartite arrangement, each party has, with respect to the preexisting insurance contract, new or different obligations and benefits.

The insurer is faced with the newly divided obligations reflected in the interests of the insured and the viatical settlement provider. While the insured gives up her financial interest in the insurance contract, her life and the risk of her death remain the subject of the insurance contract. But now, the insurer, instead of carrying its obligation to pay on the insurance contract with an insured "who guards against possible loss and disaster to [her] as an individual," *see* 1 Appleman on Insurance § 1 (2d ed. 2006) (defining life insurance), carries its obligation with a viatical settlement provider, who hopes, for financial reasons, for the early death of the insured. The insurer must also now keep track administratively of both the insured, whose life remains essential to the arrangement, and the viatical provider, who now must pay the insurer the premiums. Moreover, the fact that a new contract—the viatical settlement—introduces a new interested party to the ar-

rangement raises the possibility that the insurer can become involved in legal disputes between the insured and the viatical provider.

The insurer is also faced with changed economic risks that were not factored into its calculation of premiums. Under the two-party arrangement that preexisted the viatical settlement, the insured was in a class of persons that statistically surrendered a portion of its policies or let a portion of them lapse. Insurance companies rely on these surrender and lapse rates to calculate premiums to charge for life insurance policies. The viatical provider distorts these rates, however, because it will always hold onto the policy until the insured dies in order to protect its investment. Thus, as the initial actuarial risk is distorted with each new viatical settlement, the risk-spreading profile of the insurer becomes less reflective of its initial calculations.

The insured too faces changed obligations and risks. Fundamentally, instead of relating to the insurer as an insured whose own life is the subject of financial benefits that she controls, she now relates as an insured whose death is meaningful only to financial investors. Also, while she likely subjected herself to a health examination by the insurer when she initially purchased the life insurance policy, under the tripartite arrangement with a viatical provider, she must subject herself to routine, periodic medical examinations—perhaps even monthly. She also might have unwittingly given up rights provided by her insurance policy that could have generated cash through loans or cash surrender value because

she lacked adequate knowledge and information about the value of those rights. Finally, the insured is subjected to additional privacy concerns relating to her medical records and financial information. While generally these are already regulated to some degree, certain private financial and health matters nonetheless could legally become public as a result of a viatical settlement.

Not only are the parties to insurance contracts affected by viatical settlements, but the State too has interests, especially in ensuring (1) that its residents not be subjected to unscrupulous conduct by the viatical settlement providers who might defraud, harass, or abuse insureds in the State and (2) that its residents not defraud insurance companies in an effort to realize a quick financial return by entering into insurance contracts while hiding the fact that they will soon, within a determinable time, die.

Virginia addressed these concerns in the Virginia Viatical Settlements Act, recognizing that each party to the new tripartite arrangement has interests meriting attention and protection. The insured's privacy rights are addressed in Virginia Code § 38.2–6005; the insured's potential lack of information and knowledge about her policy and what she loses in a viatical settlement are addressed by mandating disclosures, *id.* § 38.2–6007. A requirement that the insured be of sound mind when entering into a viatical settlement is imposed in § 38.2–6008(A)(1). Section 38.2–6008 also regulates the practices of viatical settlement providers and § 38.2–6011 prohibits un-

fair advertising with respect to viatical settlements. The insurers are protected by being provided in advance with applications of their insureds for viatical settlements and the insured's medical records to allow the insurers to conduct fraud investigations. *See id.* § 38.2–6008(A)(3), (4). The Act requires viatical settlement providers to submit to the Commission for review and approval all viatical settlement contracts before closing, *see id.* § 38.2–6003, and they must pay viators (within three days of the change of beneficiary) a minimum percentage of the face value of the life insurance policy, *see* 14 Va. Admin. Code § 5–71–60. Finally, the Act requires that any viatical settlement provider dealing with Virginia citizens have a plan of operation, be competent and trustworthy, indicate an intention to act in good faith and in compliance with state licensing requirements, have a good business reputation, and be present within the State for purposes of regulation and enforcement. *See* Va. Code Ann. § 38.2–6002.

All of these matters, and more, regulated by the Virginia Viatical Settlements Act surely "relate to" the business of insurance in that they regulate the new ordering of the tripartite insurance arrangement involving the insurer, the insured, and the viatical settlement provider. *See* 15 U.S.C. § 1012(b). The term "relate to" as used in the McCarran–Ferguson Act is parallel to the same language used in the preemption provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), as both words define the scope of preemption. In ERISA, Congress preempted "any

and all State laws" that "*relate* to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a) (emphasis added). And of course, the McCarran–Ferguson Act narrows the preemption of the Commerce Clause by conferring commerce power to the States to enact laws that "relate to" the regulation of the business of insurance.

The Supreme Court has described ERISA's "relate to" language as "clearly expansive." *See N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995). Hoping to focus judicial analysis, the Court commented that a state "law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a *connection with* or *reference to* such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96–97, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) (emphasis added). But even these terms, if "taken to extend to the furthest stretch of [their] indeterminacy," would have preemption "never run its course." *Travelers*, 514 U.S. at 655, 115 S.Ct. 1671. Faced with such expansive language capable of swallowing, by its own terms, much more than Congress intended, the Court surrendered: "We simply must go beyond the unhelpful text and the frustrating difficulty in defining its key term ['relate to'], and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 656, 115 S.Ct. 1671.

Interpreting the "relate to" language in § 1012(a) of the McCarran–Ferguson Act, we

may similarly say that it is "clearly expansive" and that a state law that has a "connection with" or "reference to" the regulation of the business of insurance is saved from the Commerce Clause's preemption. But these terms too prove to be somewhat indeterminate in the context of the McCarran–Ferguson Act. Therefore, we likewise look "to the objectives of the [McCarran–Ferguson Act] as a guide to the scope of the state law that Congress understood would" be immune from dormant Commerce Clause attack. *See Travelers*, 514 U.S. at 656, 115 S.Ct. 1671.

Congress made its objectives in passing the McCarran–Ferguson Act clear by declaring "that the continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011. By passing the McCarran–Ferguson Act, Congress "put the full weight of its power behind existing and future state legislation" that relates to the business of insurance "to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it." *Prudential Ins.*, 328 U.S. at 431, 66 S.Ct. 1142. It was "Congress' purpose ... to give support to the existing and future state systems for regulating and taxing the business of insurance." *Id.* at 429, 66 S.Ct. 1142.

Thus, focusing on the business of insurance insofar as it involves the marketing, sale, execution, performance, and administration of insurance contracts, Congress gave States broad authority to regulate, and we conclude that because the Virginia Viatical Settlements Act

addresses these aspects of insurance contracts with Virginia residents, the Act "relates to" the regulation of the business of insurance.

The Virginia Viatical Settlements Act was also enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). "The broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the end, intention, or aim of adjusting, managing, or controlling the business of insurance." *Fabe*, 508 U.S. at 505, 113 S.Ct. 2202 (citation omitted). Just as the Virginia statute relates to the business of insurance, it also clearly "manages" and "controls" the relationship between the insurer and the insured and is "aimed at protecting or regulating" that relationship, as it dictates in what manner an insured may alter fundamental aspects of her relationship with the insurer.

Our holding that the Virginia Act was passed "for the purpose" of regulating the insurance business is bolstered by a comparison to the Supreme Court's holding in *National Securities*, where the Securities and Exchange Commission sought to rescind the merger of two Arizona insurance companies based on material misstatements made in violation of federal law during the merger process. 393 U.S. at 462–63, 89 S.Ct. 564. Arizona argued that under the McCarran–Ferguson Act, its merger law should govern the transaction. In holding that federal law governed, the Supreme Court noted that the state law was focused on protecting the insurance company's *stockholders* rather than "attempting to secure the interests

of *those purchasing insurance policies*," distinguishing regulations involving stockholders from regulations involving insurance policyholders. *Id.* at 460, 89 S.Ct. 564 (emphasis added). *National Securities* thus would control here *if* the Virginia Viatical Settlements Act purported to regulate the relationship between viatical settlement providers *and their investors*—the so-called "securities" side of the viatical settlements business. But the Virginia Viatical Settlements Act regulates only the "insurance" side of the transaction—involving the providers' purchase of life insurance policies from viators—with the clear purpose of securing the interests of those originally purchasing the policies by mandating that they receive a fair price from licensed providers for the policies that become the subject of viatical settlements. Indeed, the Virginia Act states that it does not apply to the securities side of the viatical settlements business. *See* Va. Code Ann. § 38.2–6016.

Consistently, in *Fabe*, the Supreme Court upheld under the McCarran–Ferguson Act a state-created bankruptcy priority favoring insurance policyholders in bankruptcy proceedings because the state law carried out "the enforcement of insurance contracts by ensuring the payment of policyholders' claims despite the insurance company's intervening bankruptcy." 508 U.S. at 504, 113 S.Ct. 2202. Thus, if a statute assigning priority in an insurance company's bankruptcy proceedings is passed "for the purpose of regulating the business of insurance," as the Supreme Court held in *Fabe*, then surely a statute regulating the

transferability of life insurance policies is also passed for the purpose of regulating the business of insurance.

Indeed, in this case, we need not even rely on the full breadth of the McCarran–Ferguson Act, which protects any law that "relates to" the regulation of the insurance business or was enacted "for the purpose of" regulating such business. We can rely on the McCarran–Ferguson Act's core protection of laws that *actually regulate* the "business of insurance." The subject matter of the Virginia Viatical Settlements Act is life insurance policies issued to Virginia residents—policies that are altered by viatical settlements. As already noted above, the insured, whose life remains the insurable interest, is given new duties and has reduced rights under the policy. By introducing a third party to the transaction whose interests are different from those of the original insured, the effect of the insured's policy on the insurer's risk pool changes.

Most importantly, however, the Virginia Viatical Settlements Act regulates directly the conduct and relationships of those traditionally engaged in the insurance business—insurers and insureds. The insurers on such contracts must be given information about every viatical settlement before the settlement is entered into. *See* Va. Code § 38.2–6008(A)(3). Moreover, in connection with every such viatical settlement, the insurer is required to respond to a request for verification of coverage within a specified time or to "indicate whether, based on the medical evidence and documents provided, [it] intends to pursue an investigation

regarding possible fraud or the validity of the insurance contract." *Id.* § 38.2–6008(A)(4). In addition, insurers are, under the Act, prohibited themselves from being viatical settlement providers. *Id.* § 38.2–6002(F). Of course, the insureds involved in viatical settlements are the principal subjects of the Virginia Viatical Settlements Act, for the Act is devoted mostly to giving them rights when they sell their financial rights in insurance contracts.

These direct regulations focused on selling insurance policies and the altering of insurance contracts surely satisfy the factors listed in *Pireno*. *See Pireno*, 458 U.S. at 129, 102 S.Ct. 3002 (directing courts to consider "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry"). Even as the Court in *Pireno* noted that none of the enumerated criteria was "necessarily determinative," *see id.*, the Court in *Kentucky Association of Health Plans*, considering the business of insurance in the context of ERISA, later chose to make a "clean break" from the *Pireno* factors insofar as they might be restrictive, relying on a "common-sense understanding" of whether the state law "substantially affect[ed] the risk-pooling arrangement between the insurer and the insured." *Ky. Ass'n of Health Plans*, 538 U.S. at 341, 123 S.Ct. 1471. Speaking in even broader terms, the Supreme Court has held that "[s]tatutes *aimed* at protecting or regulating [the] relationship [be-

tween insurer and insured], directly or indirectly, are laws regulating the 'business of insurance.'" *National Securities*, 393 U.S. at 460, 89 S.Ct. 564 (emphasis added).

In sum, we have little difficulty in concluding that the Virginia Viatical Settlements Act relates to the regulation of the business of insurance; was enacted for the purpose of regulating the business of insurance; and indeed regulates directly and substantially the actual business of insurance. Thus the McCarran–Ferguson Act saves the Act from any dormant Commerce Clause challenge.

Were there any residual doubt on this issue, Congress' treatment of viatical settlements under the Internal Revenue Code lays it to rest. In 1996, Congress amended the Internal Revenue Code to exclude from taxable income proceeds from the sale of a life insurance policy by a person who is terminally or chronically ill to a viatical settlement provider so long as the viatical settlement provider is "licensed ... *in the State* in which the insured resides." 26 U.S.C. § 101(g)(2)(B)(i)(I) (emphasis added). Moreover, if a State in which the insured resides does not provide for the licensing of viatical settlement providers, the insured still receives the tax benefit if the viatical settlement provider meets *both* "the requirements of sections 8 and 9 of the Viatical Settlements Model Act," *and* "the requirements of the Model Regulations ... relating to standards for evaluation of reasonable payments." 26 U.S.C. § 101(g)(2)(B)(ii)(I-II). Section 8 of the Model Act requires the viatical settlement provider to make extensive disclosures to the

viator, and § 9 regulates the settlement process and post-sale relationship between the provider and the viator. *Viatical Settlements Model Act* §§ 8–9 (Nat'l Ass'n of Ins. Comm'rs 2006).

Thus, in amending the Tax Code in 1996, Congress did far more than just extend significant tax benefits to viators in § 101(g)(2). It made those tax benefits *contingent* upon the viatical settlement provider's compliance with *state* licensing requirements, and when the insured's State did not require licensing, they were contingent upon compliance with numerous safeguards found in the Model Act and regulations, including the minimum prices for policies. This incorporation of state regulation shows Congress' concern with the pitfalls of an unregulated viatical market. It also reveals congressional trust in state regulatory measures to address these pitfalls. Most importantly, the contingency shows that Congress was aware of existing state regulation in the area and that it intended that the viatical settlement industry be regulated at the state, not federal, level.

In addition, § 101(g)(2) of the Tax Code requires not only that the viatical settlement provider be licensed, but also that it be licensed "in the State in which the insured resides." 26 U.S.C. § 101(g)(2)(B)(i)(I). This requirement contemplates a multi-state licensure regime. And it too encourages each State to pass viatical settlement laws because, if a State does not, its citizens may not receive the tax benefit, as the State cannot guarantee that providers will comply with the Model Act.

In short, in order to ensure that their citizens enjoy the tax benefit found in § 101(g)(2), States *must* enact licensing requirements. And the Virginia Viatical Settlements Act implements the very licensing regime Congress relied upon to confer tax benefits to viators under § 101(g)(2).

Life Partners relies heavily on *SEC v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996), to argue that viatical settlements are not part of the business of insurance which is subject, by virtue of the McCarran–Ferguson Act, to state regulation. In *Life Partners*, the Securities and Exchange Commission was attempting to exercise regulatory jurisdiction over the securities' side of a viatical settlement transaction, in which the provider sells interest in the purchased policy or policies *to investors*. 87 F.3d at 540–42. The D.C. Circuit held that the investment side of the viatical transaction is not part of the business of insurance under the McCarran–Ferguson Act. *Id.* at 541–42. But that holding has no application to this case, which deals with Virginia's efforts to regulate the insurance side of the viatical transaction—the transaction by which the policyholder sells its policy to a settlement provider. Life Partners' argument fails to distinguish the two different aspects of the viatical settlement business—the one involving the viatical settlement provider's transaction *with an insured* to purchase a policy of life insurance and the other involving the relationship between the viatical provider *and its investors* to raise money for purchasing the insurance policies. In failing to make that distinction, Life Partners also ig-

nores the Supreme Court's holding in *National Securities*, 393 U.S. at 460, 89 S.Ct. 564.

V

In its cross-appeal, the Commission argues that the district court should have "abstained from exercising jurisdiction over this case out of respect for the important State interests implicated in regulating viatical settlements by Virginia citizens," citing *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

Younger abstention is a doctrine requiring federal courts to refrain from interfering with ongoing state judicial proceedings that implicate important state interests. *See Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). When the federal case, however, involves "an overwhelming federal interest—an interest that is ... a core attribute of the national government ...—no state interest, for abstention purposes, can be nearly as strong at the same time." *Harper v. Public Serv. Comm'n*, 396 F.3d 348, 356 (4th Cir. 2005).

This case involves just such an interest, the commerce power. Thus, the issue in this case is not whether Virginia has an interest in regulating viatical settlements—it most certainly does—but whether Congress authorized Virginia to do so, and if not, whether Virginia's regulations violate the dormant Commerce Clause. In such cases, "the commerce power itself justifies a narrower view of state inter-

ests in the abstention context." *Harper*, 396 F.3d at 357.

Under these principles, we conclude that the district court did not abuse its discretion in declining to abstain under *Younger v. Harris*.

For the reasons given herein, we affirm the judgment of the district court.

AFFIRMED

APPENDIX B

LIFE PARTNERS, INC., Plaintiff,

v.

Clinton MILLER, et al., Defendants,

and

Robert McDonnell, in his official capacity as Attorney General of the Commonwealth of Virginia, Intervenor.

No. CIV.A. 305CV368–HEH.

United States District Court,
E.D. Virginia,
Richmond Division.

March 10, 2006.

MEMORANDUM OPINION

HUDSON, District Judge.

(Denying Plaintiff's Motion for Summary Judgment and Granting the Motions for Summary Judgment Filed by the Defendants and the Intervenor)

In this suit for declaratory judgment, Plaintiff challenges the constitutionality of the Virginia Viatical Settlements Act as violative of the dormant Commerce Clause of the United States Constitution. The matter is before the Court on individual motions for summary judgment filed by each of the parties, along with memoranda in support and in opposition

of the respective motions. The Court heard oral argument on February 27, 2006.

The Virginia Viatical Settlements Act ("the Act"), codified as Section 38.2–6000, Code of Virginia, 1950 as amended, regulates the sale of life insurance policies by terminally-ill persons to third parties for less than the full amount of death benefits provided under the policy. The Act defines terminally ill as "having an illness or sickness that can reasonably be expected to result in death in 24 months or less." The Act establishes elaborate regulatory measures governing viatical settlement agreements. The accompanying regulations set forth a specific minimum pricing schedule for such agreements. The focus of Plaintiff's challenge is the jurisdictional provisions of the regulatory scheme, including oversight by the Virginia Bureau of Insurance triggered solely by the legal residence of the viator. Plaintiff contends that the scope of Virginia's regulatory control is sufficiently broad to effect commerce occurring wholly outside the geographic boundaries of the Commonwealth of Virginia. Plaintiff further maintains that the price controls and regulatory scheme are inspired by economic protectionism and has the effect of discriminating against and discouraging interstate commerce.

Because aspects of this Court's dormant Commerce Clause analysis turn on the intrastate elements of the transaction giving rise to this controversy, a thorough recital of the underlying facts is critical. There appears to be no material facts in dispute.

The Court's findings of fact are mined from the statements of undisputed facts contained in each party's Memorandum in Support of Motion for Summary Judgment. A close examination of those statements reveal the following factual premise. The opinions of defense experts are considered separately.

I. Background

The viator, Jane Doe ("Ms. Doe"),[1] was a resident of Martinsville, Virginia, and a client of Life Partners, Incorporated ("LPI"). There is no dispute that Ms. Doe met the statutory definition of a terminally-ill patient under the Act. Ms. Doe had a life insurance policy with a value of $115,000 at death. For undisclosed reasons, Ms. Doe elected to sell her life insurance policy, presumably to generate cash.

In order to market her policy, Ms. Doe contacted Ideal Settlement, Inc. ("Ideal"), a New Jersey corporation, through the internet. On March 16, 2004, Ms. Doe entered into an agreement ("the Agreement") with Ideal to market her policy. Under the terms of the Agreement, Ideal was engaged to serve as a broker and obtain bids for the purchase of Ms. Doe's policy. It appears to be undisputed that Ms. Doe never left the Commonwealth of Virginia, so presumably, the Agreement was arranged and negotiated by telephone. In order to locate an interested buyer, Ideal contacted the plaintiff, LPI.

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[1] Jane Doe is a pseudonym used by the Court to protect the identity of the viator.

LPI is a Texas corporation with its sole office in Waco and is a licensed viatical settlement provider under Texas law. LPI describes itself as an agent that represents purchasers in viatical transactions, but is not a broker. LPI is neither licensed in Virginia nor does business in the state. LPI markets their services nationally. The evidence is unclear whether LPI has purchased other insurance policies from Virginia residents.

At the invitation of Ideal, LPI assembled a consortium of twelve (12) interested persons located in seven (7) states, who were interested in purchasing Ms. Doe's policy as a group. None of the twelve (12) members of the investment group resided in the Commonwealth of Virginia. In negotiating the viatical settlement at issue in this case, LPI contacted Ms. Doe in Virginia at least twice by telephone. LPI submitted three (3) bids, or sales proposals, to Ms. Doe with progressively increasing sales prices. The Agreement was sent by LPI from Texas to Ms. Doe in Virginia by FedEx. By its terms, Ms. Doe sold her $115,000 life insurance policy to the investment group for $29,900. The Agreement specified that "this agreement was entered into in the State of Texas and its validity, construction, interpretation and legal effects should be governed by the laws and judicial decisions of that State . . . ." (See Agreement at Section 7.11.) The Agreement further provided "that the transaction is governed by and subject to the rules and regulations governing viatical settlements under the Texas Insurance Code". (See Agreement at Section 7.12.) Ms. Doe executed the

Agreement in Virginia and returned it to LPI in Texas, where it was countersigned by a corporate officer of LPI.

Subsequent to executing the Agreement, Ms. Doe contacted LPI and demanded payment of the minimum price prescribed by Virginia law for her insurance policy, which would have been $69,000 under the Virginia regulations. LPI declined, citing the provisions of the Agreement designating Texas law as controlling. Ms. Doe then filed a complaint with the Virginia Bureau of Insurance ("VBI"). After conducting a inquiry, the VBI concluded that LPI may need to obtain a Virginia license before transacting business in viatical settlements with a resident of the Commonwealth of Virginia. At the request of the VBI, the Virginia State Corporation Commission ("SCC") issued a rule to show cause against LPI requiring it to explain why it was conducting business without proper registration in violation of Section 38.2–6,000, *et seq*. This lawsuit followed.

II. Standard of Review

Under Rule 56(c) of the Federal Rules of Civil Procedure, the Court must grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). After the movant has met this burden, the nonmoving party must come forward with specific facts showing that evidence exists to

support its claims and that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of **material** fact. *See Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. "Rule 56(e) requires the non-moving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548. Summary judgment is proper if after viewing all the evidence, including supplemental affidavits, in the light most favorable to the non-moving party, the Court finds no genuine issue exists. *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505.

III. Standing

Before addressing the merits of the underlying action, the Court must first determine if the plaintiff has standing to contest the Act. Plaintiff has stated equivocally that its claim is limited to an as applied rather than a facial challenge.

Article III of the United States Constitution requires a plaintiff to demonstrate their standing by showing that they have suffered a judicially cognizable and redressible injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). In order to demonstrate a cognizable

injury, the plaintiff must show that: (1) they have personally suffered an actual or threatened injury that is concrete and particularized, not conjectural or hypothetical; (2) the injury fairly can be traced to the challenged action; (3) the injury is likely to be redressed by a favorable decision from the Court. *Burke v. City of Charleston*, 139 F.3d 401, 405 (4th Cir. 1998) (citing *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130).

Assuming Plaintiff satisfies these constitutional requirements, they must also meet the requirements of prudential standing. *Id.* "Prudential considerations constitute a supplemental aspect of basic standing analysis and address concerns regarding the need for judicial restraint." *Oxford Assocs. v. Waste Sys. Auth.*, 271 F.3d 140, 145 (3rd Cir. 2001). "Prudential standing entails an inquiry into a plaintiff's role because 'the aim of this form of judicial self-governance is to determine whether the plaintiff is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.' " *Id.* To satisfy prudential requirements, plaintiff's must assert their own legal rights and interests rather than those of a third party. Plaintiffs must also show that their interests fall arguably within the zone of interests that the statute, rule or constitutional provision in question protects or regulates. Finally, the court should refrain from adjudicating a " 'generalized grievance shared in substantially equal measure by all or a large class of citizens . . . .' " *Burke*, 139 F.3d at 405 (quoting *Warth*

v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

Assuming without deciding that the Act discriminates against interstate commerce, Plaintiff clearly has shown a concrete and redressible injury. Plaintiff's injury stems from the SCC's issuance of the rule to show cause. This puts Plaintiff in the dilemma of either complying with an arguably unconstitutional statute or facing administrative sanction. A favorable ruling by this Court, invalidating the underlying statute, would clearly redress Plaintiff's injury and presumably terminate the show cause proceedings. As a result, this Court is convinced that the plaintiff has constitutional standing to challenge the Act.

Plaintiff has also fulfilled the requirements of prudential standing. Enforcement of the Act would require the plaintiff to comply with all of its provisions. Therefore, Plaintiff's claim is not a generalized grievance, rather LPI has asserted its own individualized legal interest in assuring that it is not required to comply with an unconstitutional statutory provision. Furthermore, the plaintiff has alleged that the Act infringes on its right to engage in interstate commerce, and as a result, the claim falls squarely within the zone of interest the dormant Commerce Clause was designed to protect. As the United States Supreme Court has explained, Commerce Clause jurisprudence is designed to protect the states and "to benefit those who . . . are engaged in interstate commerce." *Dennis v. Higgins*, 498 U.S. 439, 450, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991). As a viatical provider, Plaintiff is engaged in inter-

state commerce and falls into the zone of interest protected by the dormant Commerce Clause. Accordingly, Plaintiff has demonstrated both constitutional and prudential standing to bring the present action.

IV. Analysis

A. The Commerce Clause

The Commerce Clause of the United States Constitution provides "Congress shall have Power . . . [to] regulate Commerce . . . among the several states." U.S. Const. Art. I, § 8, cl. 3. Congress's authority to regulate commerce pursuant to the Constitution inherently carries with it a prohibition to the states to refrain from enacting laws which impede the flow of interstate commerce. *See Cooley v. The Board of Wardens*, 53 U.S. 299, 318, 12 How. 299, 13 L.Ed. 996 (1851). This authority, known as the dormant Commerce Clause, "has long been understood . . . to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted.' " *Barclays Bank, PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 310, 114 S.Ct. 2268, 129 L.Ed.2d 244 (1994) (quoting *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945)). The dormant Commerce Clause "limits the power of the States to erect barriers against interstate trade." *Dennis*, 498 U.S. at 446, 111 S.Ct. 865. However, this limitation on state power "is by no means absolute. In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,'

even though interstate commerce may be affected." *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 355 (4th Cir. 2002) (quoting *Lewis v. BT Inv. Mgrs., Inc.*, 447 U.S. 27, 36, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980)).

Review of a dormant Commerce Clause challenge to a state statute requires a two-tier analysis. *Brown–Forman Distillers, Corp. v. New York Liquor Auth.*, 476 U.S. 573, 578–79, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986). The first tier of analysis, referred to as the discrimination tier, is a "virtually *per se* rule of invalidity" and applies "when a state statute clearly discriminates against interstate commerce." *Wyoming v. Oklahoma*, 502 U.S. 437, 454, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992). When a statute is clearly discriminatory, the Court will apply strict scrutiny and the statute will be struck down unless the state demonstrates "that the discriminatory law is demonstrably justified by a valid factor unrelated to economic protectionism, and that there are no nondiscriminatory alternatives adequate to preserve the local interests at stake . . . ." *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996) (internal citations omitted.) If the state statute does not "clearly discriminate" but instead "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . ." a less strict scrutiny applies, known as the undue burden tier or the *Pike* balancing tier. *Yamaha Motor Corp. v. Jim's Motorcycle Inc.*, 401 F.3d 560, 567 (4th Cir. 2005) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174

(1970) (internal quotation marks omitted)). Under a *Pike* analysis, a nondiscriminatory statute with only an incidental effect on commerce "will be upheld unless the burden imposed on . . . commerce is clearly excessive in relation to the putative local benefits." *Id.* The Supreme Court has acknowledged that "there is no clear line separating close cases on which scrutiny [or which tier of analysis] should apply." *Wyoming*, 502 U.S. at 455 n.12, 112 S.Ct. 789.

B. Discrimination Tier

Under the discrimination tier, a statute clearly discriminates when it "discriminates facially, in its practical effect, or in its purpose." *Envtl. Tech. Council*, 98 F.3d at 785 (4th Cir. 1996). A statute discriminates in its practical effect when it favors in-state economic interests over out-of-state economic interests, or when it has an extraterritorial reach such that it regulates commerce wholly outside the state's borders. *See Brown-Forman*, 476 U.S. at 579, 106 S.Ct. 2080, *See also Healy v. Beer Inst.* 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989); *Baldwin v. G.A.F., Seelig, Inc.*, 294 U.S. 511, 521, 55 S.Ct. 497, 79 L.Ed. 1032 (1935).

Plaintiff mounts its constitutional attack on all fronts. LPI argues that the regulatory scheme is per se unconstitutional because it directly affects interstate commerce. Specifically, LPI maintains that the Act regulates transactions predominately interstate in nature, transactions occurring outside the Commonwealth of Virginia, influences out-of-state

pricing behavior, and subjects market participants to inconsistent regulations. Alternatively, LPI asserts that the Act is unconstitutional under a second or *Pike* tier analysis, in that it imposes undue burdens on interstate commerce, which are not outweighed by its putative local benefits.

Defendants counter that the Act does not violate the dormant Commerce Clause because it regulates evenhandedly with only incidental effects which do not excessively burden interstate commerce. In the alternative, Defendants offer two (2) independent grounds on which this Court could find the Act to be a constitutionally appropriate exercise of power, without reaching the core issue, namely that: (1) Congress has expressly approved state regulation of the viatical settlement industry; and (2) the Act is immunized from a dormant Commerce Clause attack by the McCarran–Ferguson Act ("McCarran–Ferguson"). *See* 15 U.S.C. § 1011 *et seq.* The Court will address these arguments before reaching its dormant Commerce Clause analysis.

"Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce." *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983). However, in order to exempt a state statute from the implied implications of the Commerce Clause, Congress's intention to do so must be " 'unmistakably clear' or 'expressly stated.' " *Envtl. Tech. Council*, 98 F.3d at 782 (4th Cir. 1996) (quoting *South–Central*

Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91–92, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984)).

Defendants argue that Congress specifically authorized states to regulate viatical settlements by enacting Title 26 U.S.C. § 101(g)(2)(B) of the United States Tax Code. This statute provides tax exempt status to proceeds of the sale of an insurance contract sold to a viatical settlement provider if the provider is licensed in the state in which the insured resides, or complies with certain provisions of the Model Regulations or the Model Act. *See* 26 U.S.C. § 101(g)(2)(B).

On careful review, the Court is of the opinion that the statute neither provides express congressional authority to regulate interstate viatical transactions, nor is "unmistakably clear" as to Congress's intent to authorize states to do so. In fact, there is no evidence in the legislative history that Congress ever intended § 101(g) to grant such authority to the states. Rather, the statute only evidences a legislative desire to extend tax benefits to viators. Accordingly, this Court declines to adopt Defendants' overly broad interpretation of the effect of this statute. The Court, however, will not entirely discount the significance of § 101(g). As will be explored in greater detail below, this statute conveys undeniable benefits to viators and plays a role in the Court's dormant Commerce Clause analysis.

With respect to Defendants' argument concerning the applicability of McCarran–Ferguson, it is unnecessary for the Court to reach the merits of this argument given its ul-

timate finding that the Act does not violate the dormant Commerce Clause.

Turning back to the merits of LPI's Commerce Clause challenge, central to the elements of Plaintiff's direct regulation argument is the contention that the viatical settlement agreement in this case was a Texas transaction, placing it beyond the reach of Virginia regulatory laws. Plaintiff's position flows from the language of the Agreement, namely Sections 7.11 and 7.12, and the fact that significant portions of the underlying course of dealings occurred from Plaintiff's Texas headquarters. As further evidence of tenuous Virginia ties, Plaintiff notes that Ms. Doe initially placed her policy with Ideal, a New Jersey based company, through the internet.

The two provisions of the Agreement relied upon by Plaintiff read in pertinent part:

> Section 7.11: This Agreement was entered into in the State of Texas and its validity, construction, interpretation and legal effect shall be governed by the laws and judicial decisions of that state . . . .
>
> Section 7.12: This Agreement is governed by and subject to the rules and regulations relating to viatical settlements as that term is defined under the Texas Insurance Code and regulations promulgated thereunder. The Parties hereby agree that the Texas Department of Insurance has regulatory jurisdiction over this transaction irrespective of the residence of the Seller . . . .

Section 7.11 appears to be a standard choice of law provision. If the terms of the

Agreement were in dispute, or their legal effect uncertain, a reviewing court would look to the law of the State of Texas to resolve the controversy. Furthermore, the parties agreed in Section 7.12 that the Texas Department of Insurance would have regulatory jurisdiction over the transaction irrespective of the residence of the seller. However, this stipulation did not totally divest the Commonwealth of Virginia of regulatory jurisdiction over transactions occurring with its residents within its borders. If the transaction between Ms. Doe and LPI had occurred "wholly outside" the boundaries of the Commonwealth of Virginia, the regulatory scheme at issue may be unconstitutional. *Edgar v. MITE Corp.*, 457 U.S. 624, 642, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982). If on the other hand the transaction occurred within the boundaries of the Commonwealth of Virginia, it would be constitutional so long as the regulation furthered legitimate in-state interest. *Id.* at 643–46, 102 S.Ct. 2629. In the immediate case, the agreement formed between LPI and Ms. Doe implicated the regulatory interest of both Texas and Virginia. "Thus, when an offer is made in one state and accepted in another, we now recognize that elements of the transaction have occurred in each state, and that both states have an interest in regulating the terms and performance of the contract." *A.S. Goldmen & Co. v. New Jersey Bureau of SEC*, 163 F.3d 780, 787 (3rd Cir. 1999).

Plaintiff relies on *Dean Foods Co. v. Brancel*, 187 F.3d 609 (7th Cir. 1999), for its contention that the Agreement in this case was the product of a transaction occurring wholly

outside the Commonwealth of Virginia. *Dean Foods* involved a constitutional challenge to Wisconsin's milk pricing regulations. Wisconsin farmers conducted what the court described as preliminary negotiations for the sale of milk with Illinois dairy plants. This included telephone contact and meetings with field representatives. However, the transaction was not complete until Wisconsin farmers transported their product to Illinois plants. The contract was not final until the product had been examined and accepted. The court in *Dean Foods* held that the contract was formed in Illinois and that Wisconsin could not regulate the price of milk sold in Illinois.

The court in *Dean Foods* distinguished the case from *A.S. Goldmen & Co.*:

> There, an offer was made by a securities dealer in New Jersey and accepted by various individuals outside of New Jersey. . . . That stands in marked contrast to the situation here, where we have held that the contract was created and performed wholly in Illinois. This is not a case where 'elements of the transaction have occurred in each state.'

187 F.3d at 620.

LPI also draws the Court's attention to *Shafer v. Farmers' Grain Co. of Embden*, 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909 (1925). At issue in *Shafer* was the interstate effect of the North Dakota Grain Grading Act. The act established an elaborate system for grading and regulating wheat earmarked for interstate shipment. The purpose or intent of the act was

to prevent unreasonable margins of profit. 268 U.S. at 200, 45 S.Ct. 481. The Supreme Court struck down the act as violative of the dormant Commerce Clause because it directly affected the price of wheat sold in other states. *Shafer* is distinguishable from the immediate case because here the sale of Ms. Doe's life insurance policy occurred, at least in part, in Virginia. In addition, unlike *Shafer*, the Virginia Act, and accompanying regulation, prescribes identical regulation and pricing for in-state and out-of-state transactions.

A survey of dormant Commerce Clause jurisprudence reveals no widely accepted standard to assess the sufficiency of a state's contacts and interests to justify regulatory measures. Perhaps the most instructive case on this point, decided by the United States Court of Appeals for the Fourth Circuit, is *Underhill Assoc., Inc. v. Bradshaw*, 674 F.2d 293 (4th Cir. 1982). In *Underhill*, a group of discount securities brokers challenged the power of the Commonwealth of Virginia to regulate the activities of non-resident securities brokers under both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. In upholding the regulatory scheme, the Fourth Circuit noted "[t]o determine Virginia's power to regulate the activities of nonresidents, we must look to the extent of these nonresidents' contacts with Virginia and to the nature and extent of the state's interest in exercising its authority." *Id.* at 295. The court cited approximately a dozen decisions of the U.S. Supreme Court or other circuits consistent with this conclusion, including *Travelers*

Health Ass'n v. Virginia, 339 U.S. 643, 648, 70 S.Ct. 927, 929, 94 L.Ed. 1154 (1950), and *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568, 37 S.Ct. 227, 61 L.Ed. 498 (1917). The court went on to conclude in *Underhill* that "[i]t is not only desirable, but Virginia's interest in protecting its citizens from possibly dishonest or incompetent securities dealers is obvious." *Underhill*, 674 F.2d at 295.

Applying the contacts and interest approach announced in *Underhill* to the immediate case, it is this Court's opinion that the viatical settlement transaction at issue involved sufficient contacts with the Commonwealth of Virginia to warrant compliance with its regulatory scheme if the underlying statute is constitutionally sound. Not only did Ms. Doe reside in Virginia, but it is undisputed that she never left the Commonwealth during the negotiations leading up to this viatical settlement agreement. She placed and received calls in Virginia. She received multiple settlement agreements sent to Virginia for her review, two (2) of which she rejected. Most importantly, she signed the final Agreement in Virginia.

The choice of law provisions contained in the Agreement do not change this result. If this case were a dispute over the terms of the Agreement, Section 7.11 would clearly dictate that the law of Texas would control. Furthermore, if the Agreement had been consummated outside of the Commonwealth of Virginia, Section 7.12 would give the Texas Department of Insurance exclusive regulatory jurisdiction. However, since the transaction touched both Virginia and Texas, it implicated the legisla-

tive interests of both states. *See A.S. Goldmen & Co.*, 163 F.3d at 786–87.

The Court therefore concludes that the viatical settlement agreement in this case was not the product of a purely Texas based transaction as Plaintiff argues. The contacts with Virginia are sufficient to give the Commonwealth regulatory jurisdiction. If the factual basis on which this case is premised involved a viatical settlement agreement negotiated and consummated totally beyond the borders of Virginia, even by a Virginia resident, portions of the Act may well offend the dormant Commerce Clause. That, however, must be left for a later date.

The Court will turn next to the individual parts of Plaintiff's first tier or per se invalidity argument. This facet of Plaintiff's challenge has four (4) components, namely that the Act: 1) regulates transactions predominately interstate in nature; 2) regulates transactions occurring outside the Commonwealth of Virginia; 3) influences out-of-state pricing behavior; and 4) subjects market participants to inconsistent regulation.

For the reasons discussed above, this Court rejects the contention that under the facts of this case, the Act regulates only interstate commerce and is extraterritorially regulating "a Texas contract." Significant parts of this transaction occurred in Virginia, which justified regulatory oversight. The fact that there are no viatical settlement providers with offices in Virginia is inconsequential. Twelve (12) viatical settlement providers are licensed

in Virginia. If a provider chooses to enter the Virginia viatical settlement market and do business with a terminally-ill viator physically located in Virginia, it does not overly burden interstate commerce to require compliance with the Commonwealth's regulatory scheme. Moreover, the Act affects providers situated both within and without the Commonwealth equally.

Relying on the opinions of its experts, LPI contends that Virginia's pricing regulations for viatical agreements unduly influence the marketing of similar agreements in other states. In its experts' view, the higher prices required by the regulations accompanying the Act, skew prices elsewhere and directly affect the interstate market. The experts opine that Virginia's price controls are a barrier to the marketability of policies offered for sale by Virginia residents. Their position is based in part on the fact cited by LPI that over a designated period, 170 policies were sold by Virginia viators, and only three (3) were sold in conformity with the price regulations at issue. LPI argues that it is a reasonable inference that the price controls were evaded, because otherwise, the policies would have been unmarketable. Essentially, Plaintiff contends that the Virginia minimum price controls set a price that is so artificially high that no reasonable viatical settlement company would ever agree to enter into a sale or purchase at those prices. Assuming that LPI's experts are correct, this incidental effect does not necessarily transgress the dormant Commerce Clause.

Contrary to Plaintiff's argument, the Virginia pricing schedule does not discriminate against out-of-state transactions. The pricing regulations affect all markets equally, irrespective of whether the policy is sold in Virginia, Texas or California. By electing to transact business with a client physically located in Virginia, Plaintiff chose to enter a regulated market, fully cognizant of the price restrictions. This is not the case of a product being exported to another state for sale in that jurisdiction. The incidental effect of the intrastate pricing of viatical settlements on the interstate market is no different than the price of any other commodity sold in the Commonwealth, regulated or unregulated.

The opinion advanced by LPI's experts that Virginia pricing regulations are a direct barrier to interstate marketability adds little to Plaintiff's argument. If the pricing schedule chills the interstate market, it has an identical effect on intrastate sales.

The last segment of Plaintiff's first tier challenge involves the alleged effect of inconsistent regulations on interstate commerce. According to Plaintiff, the Act creates irreconcilable conflicts when dealing with providers from other states. Plaintiff argues that the Act violates the dormant Commerce Clause because it subjects out-of-state businesses to inconsistent regulatory regimes. "A state regulation might impose a disproportionate burden on interstate commerce if the regulation is in substantial conflict with a common regulatory scheme in place in other states." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 112 (2nd

Cir. 2001) (citing *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 445, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978)). However, "state laws which merely creates additional, but not irreconcilable, obligations are not considered to be 'inconsistent' for this purpose." *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 826 (3rd Cir. 1994).

Specifically, Plaintiff identifies two (2) conflicts between Virginia and Texas regulations.[2] First, Plaintiff argues that § 38.2–6012(C) of the Act conflicts with Title 28 Texas Administrative Code § 3.1710(c)(8) (2006) because "the Act regulates which state's laws govern contractual disputes between competing viators, irrespective of the contractual agreements executed by the parties." (Pl. Mot. Summ. J. at 17.) Plaintiff asserts that this provision is in direct conflict with Texas law which states "no viatical or life settlement provider . . . shall enter into any viatical or life settlement in which any form used to effect the settlement . . . makes any other state's laws as the law applicable to the form." *Id.* (quoting 28 Tex. Admin. Code § 3.1710(c)(8) (2006)).

The Court is of the opinion that Plaintiff misconstrues § 31710(c)(8) in an attempt to

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[2] This Court has reviewed Plaintiff's Exhibit 9 in support of its conflicting regulation argument. However, Plaintiff highlights no specific inconsistencies other than the two (2) mentioned above, and the Court will not conduct a line by line analysis on its own.

create a conflict where one does not exist. Section 31710(c)(8) states in full:

> [n]o viatical or life settlement provider, provider representative, or broker shall:
>
> enter into any viatical or life settlement **in this state** in which any form used to effect the settlement, including escrow or trust agreement, contains a provision that either requires or limits a viator, life settlor, or owner to resolve a legal dispute with the viatical or life settlement provider, provider representative, or broker in any state other than Texas, specifies a particular city or county, or resolving dispute, or makes any other state's laws as the law applicable to the form (emphasis added).

It is clear from the plain language of the statute that § 31710(c)(8) prohibits a viatical provider or broker from entering into a viatical agreement which contains a choice of law provision, which gives another state regulatory authority over the transaction if the agreement **is entered into in Texas**. As mentioned above, the Agreement in question was not "entered into in Texas" and as a result, there is no actual tension between the laws of Virginia and Texas. As the Second Circuit has advised, "[i]t is not enough to point to a risk of conflicting regulatory regimes in multiple states; there must be an actual conflict between the challenged regulation and those in place in other states." *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 112. Accordingly, this Court declines to invalidate a state law based on a hypothetical

conflict or mere speculation that there may be a potential conflict under a different factual setting.

Plaintiff next contends that there is an irreconcilable conflict between the law of the two (2) states because the Virginia Act presumes that a viatical settlement broker is the agent of the viatical settlement provider, unless there is a written agreement between the broker and the viator specifying otherwise. 14 Va. Admin. Code § 5–71–50 (2005). This, LPI claims, is in direct conflict with Texas law which requires a broker to act as a fiduciary to the viator and forbids a broker from being the agent of the provider. 28 Tex. Admin. Code § 3.1711 (2006). Essentially, Plaintiff argues that it is impossible for a viatical settlement broker to comply with both regulations because Texas law requires the broker to be the fiduciary of the viatical settlement provider, while Virginia law requires a broker to be the fiduciary of the viator. The Court is not convinced that this facial inconsistency rises to the level of an irreconcilable conflict. Virginia law does not forbid a broker from acting as an agent for the viator. Rather, it merely requires that the broker first obtain written authorization from the provider before doing so. As a result, a broker can comply with the laws of both states by simply executing a written agreement authorizing it to act as an agent of the viator. The fact that Virginia law has additional requirements does not make it irreconcilable with Texas law. It is merely the cost of doing business, which the Plaintiff assumed when they chose to conduct business in a state other than Texas.

In the final analysis, the Court finds the Virginia Viatical Settlements Act neither discriminates against interstate commerce facially nor in its practical effect. It treats those in-state and out-of-state providers wishing to do business in the Virginia market similarly. Furthermore, there is no tenable basis for Plaintiff's claim that the law was enacted for a discriminatory purpose. It was clearly not intended to protect the economic interests of Virginia-based settlement providers. There are none. Its obvious purpose was to safeguard an asset of some of its most vulnerable citizens, the terminally ill.

The Commonwealth of Virginia has a legitimate interest in protecting the welfare of terminally-ill citizens seeking to liquidate their life insurance policy within its borders. Given the fact that thirty-seven (37) other states have adopted similar versions of the Model Viatical Settlements Act, on which the Virginia statute is based, it appears to be an appropriate exercise of its police powers.

C. Undue Burden Tier

Having determined that the Act does not clearly discriminate facially or in its direct practical effect, the Court must now determine if it violates the second tier of the analysis. This facet of the analysis is governed by balancing the factors articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). *Pike* applies when a state law does not consciously discriminate against interstate commerce, but instead regulates evenhandedly and only indirectly affects inter-

state commerce. *Brown–Forman*, 476 U.S. at 579, 106 S.Ct. 2080. "Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. 844. In applying the *Pike* balancing test, the Court should balance "(1) the nature of the local benefits advanced by the statute; (2) the burden placed on interstate commerce; and (3) whether the burden is 'clearly excessive' when weighed against these local benefits." *Star Scientific*, 278 F.3d at 357.

The first task is to determine if the Act has a legitimate local purpose. If the Court finds a legitimate local purpose, "then the question becomes one of degree . . . [a]nd the extent of the burden that will be tolerated will . . . depend on the nature of the local interest, and on whether it could be promoted as well with a lesser impact on interstate activity." *Id.* at 356–57. "In determining whether a statute has a 'legitimate local purpose' and 'putative local benefits,' a court must proceed with deference to the state legislature." *Yamaha Motor Corp.*, 401 F.3d at 569.

The Court finds that the Act has a legitimate and important local purpose, namely, the protection of Virginia viators. It is obvious to the Court that a terminally-ill person with a life expectancy of twenty-four (24) months or less is in a particularly vulnerable position and could easily fall prey to sharp business practices and fraud. The Act's various require-

ments provides the SCC with a regulatory framework which affords Virginia viators with some assurance that the viatical settlement industry will transact business in an honest and ethical fashion. These regulatory burdens impose requirements similar to those governing such other industries as banking, insurance and security dealers. The Act also provides viators with a recourse should the brokers or providers fail to comply with these standards. Finally, when read in tandem with 26 U.S.C. § 101(g)(2)(B) of the Tax code, the Act bestows considerable tax benefits on viators by exempting the proceeds from the sale of their insurance policies from federal income tax.

Plaintiff offers a host of perceived burdens to be weighed against the local benefits of the Act. Plaintiff disputes the defendants' contention that the statute actually protects Virginia viators. Aside from Ms. Doe's complaint, there is no evidence of any other reported cases of alleged fraud or abuse in the Virginia viator settlement industry. Therefore, Plaintiff argues that there is no demonstrated harm which warrants the protection of the Act.

Plaintiff's argument, however, fails to acknowledge the possibility that the Act has been successful in its purported purpose and has deterred unethical or fraudulent activity within the industry. Plaintiff's position also marginalizes the rationale underlying the Model Viatical Settlements Act which has been adopted, at least in part, by over thirty (30) states. Obviously, the legislative bodies of those states uniformly found a sufficient potential for abuse

to warrant protective measures. Ostensibly, the Virginia General Assembly made similar findings. This Court is not "inclined to second guess the impartial judgments of lawmakers concerning the utility of legislation." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987). At bottom, this Court must limit its consideration of "whether the legislature had a rational basis for believing there was a legitimate purpose that would be advanced by the statute ... [and] likewise apply a deferential standard in identifying a statute's putative benefits." *Yamaha Motor Corp.*, 401 F.3d at 569 (citing *CTS Corp.*, 481 U.S. at 92–93, 107 S.Ct. 1637).

Relying largely on the opinions of its experts, Plaintiff next counters that the Act, when carefully examined, provides minimal benefits to Virginia viators. Plaintiff contends that the pricing regulations actually disserve Virginia viators by impeding the marketability of their policies. Because the regulation-driven price of Virginia policies exceeds the mean national market price, Virginia policies are not competitive. This "argument [however] relates to the wisdom of the statute, not its burden on commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978). If Virginia viators find the price controls to be a barrier to marketing their policies, they should petition the Virginia

General Assembly or the SCC for relief.[3] Finally, it is important to keep in mind that the Virginia pricing policy effects intrastate and interstate sales equally.

Plaintiff further maintains that Ms. Doe derived no significant protection from the Virginia regulatory scheme because the laws of Texas afforded her similar coverage. This may be true in the abstract, but the obvious flaw in Plaintiff's position is the necessity for Ms. Doe, a terminally-ill person, to travel to the State of Texas to avail herself of a Texas forum. Plaintiff further suggests that Virginia's anti-fraud laws provide viators with ample protection from unprincipled practices. The Virginia Viatical Settlements Act is intended to encompass many types of unethical and unfair trade practices which may not amount to fraud. Rather than require an injured viator to cobble together a cause of action from an assortment of legal theories, the Virginia General Assembly chose to address it directly. The benefits of this approach are self-evident.

The last category of burdens which allegedly outweigh the local benefits is the elaborate regulatory scheme required of viatical set-

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[3] The Court also questions the legitimacy of Plaintiff's argument based on the fact that statistics, produced by the Bureau of Insurance, indicate that the number of viatical settlement transactions occurring in Virginia, by parties licensed in accordance with the Act, has steadily increased since 2001. These statistics indicate there is an increasing viatical market in Virginia, despite any incidental effects of the Act on the market.

tlement brokers and providers in Virginia. According to Plaintiff's experts, Virginia's redundant licensing and regulatory requirements, particularly when coupled with price controls, affect both intrastate and interstate viatical transactions, with the primary effect of a disproportionate burden on smaller firms.

The Court first notes that any disproportionate effect the Act has on smaller firms as opposed to larger firms, is irrelevant to dormant Commerce Clause analysis. The Court may not limit its focus to the affect of the Act on one particular type of entity. Rather, the Court must look to the affect of the Act on the entire viatical market. As the Supreme Court advised in *Exxon Corp.*, "the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." 437 U.S. at 128, 98 S.Ct. 2207.

As to the effect of the Act on the intrastate market, Plaintiff's experts contend that the Act affects the intrastate market because "voluntary transactions that would otherwise have taken place are blocked, or must take place outside the state [of Virginia]." There is little doubt that the Act imposes some burden on both intrastate and interstate commerce. However, as mentioned above, the Act burdens both the in-state and out-of-state markets equally. This fact substantially undermines Plaintiff's argument. The Court finds that the incidental burden imposed by the Act on both markets is justified as a legitimate function of the state's police powers. It is clear that "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws

governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent regulate it." *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 350, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (internal citations omitted). Furthermore, "[t]he State is entitled to exercise its police power in the manner it sees fit, so long as it is legislating constitutionally." *Baltimore Gas & Elec. Co. v. Heintz*, 760 F.2d 1408, 1425 (4th Cir. 1985). There can be little doubt that protecting viators from fraud is a local concern which falls within the residuum of the state's police powers. Assuming without deciding that some viators will voluntarily leave the state to do business in order to avoid the regulatory effects of the Act, this is not the type of burden that the dormant Commerce Clause was designed to protect against.

The Court is also of the opinion that the expert's analysis of the effect of the Act on the interstate market is of little value based on the facts before the Court. The experts contend that "if a state like Virginia is permitted to enforce its minimum price control regulation across the national market, the vast majority of Virginia sellers would be shut out of the market." (Pl.'s Ex. 6 ¶ 30.) However, contrary to the experts' conclusion, Ms. Doe's transaction is not a situation in which Virginia is enforcing the provisions of the Act "across the national market place." As discussed above, this is a transaction which occurred at least in part in the Commonwealth of Virginia. If Virginia was in fact enforcing the Act across the national market place, this alleged burden may

be more significant to the Court's analysis. However, this is not the case and the Court will not invalidate a state statute based on facts which are not before it.

As a result, this Court finds that the Act effectuates a legitimate local public interest and that its effects on interstate commerce are only incidental. Therefore, the Act must "be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. 844. The Court further finds that the burdens imposed by the Act are not "clearly excessive" when compared with the legitimate and important purpose behind the Act. The Court is also of the opinion that nothing short of Virginia's comprehensive regulatory scheme, which couples licensing and registration with price controls, could provide a level playing field for its physically infirm citizens financially constrained to liquidate their life insurance policy. The Virginia Viatical Settlements Act is far from a vagrant protectionist whim. It parallels legislation enacted in over thirty (30) other states with a common origin, the Model Viatical Settlements Act. Thus, the Court concludes that the legitimate purpose of the Act cannot be achieved with a lesser impact on interstate commerce.

V. Conclusion

The Court finds that the Virginia Viatical Settlements Act does not violate the Commerce Clause of the United States Constitution and, therefore, Plaintiff's Motion for Summary Judgment will be denied. Defendants' and In-

tervenor's Motions for Summary Judgment will be granted.

An appropriate Order will accompany this Memorandum Opinion.

ORDER

(Denying Plaintiff's Motion for Summary Judgment and Granting the Motions for Summary Judgment Filed by the Defendants and the Intervenor)

THIS MATTER is before the Court on cross-Motions for Summary Judgment. For the reasons stated in the accompanying Memorandum Opinion, Plaintiff's Motion for Summary Judgment is DENIED. Defendants' and Intervenor's Motions for Summary Judgment are GRANTED.

The Clerk is directed to send a copy of this Order to all counsel of record.

It is SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 29, 2007

No. 06-1370
3:05-cv-00368-HEH

LIFE PARTNERS, INCORPORATED

Plaintiff - Appellant

v.

THEODORE V. MORRISON, JR.; MARK C. CHRISTIE, in their official capacities as Commissioner of the State Corporation Commission; ALFRED W. GROSS, in his official capacity as the Commissioner of Insurance; JUDITH WILLIAMS JAGDMANN, in her official capacity as Commissioner of the State Corporation Commission

Defendants – Appellees

ROBERT F. MCDONNELL, in his official capacity as the Attorney General of the Commonwealth of Virginia

Intervenor – Appellee

and

CLINTON MILLER, in official capacity as Commissioner of the State Corporation Commission

Defendant

NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS; NORTH AMERICA SECURITIES ADMINISTRATORS ASSOCIATION, INCORPORATED

Amici Supporting Appellees

and

VIATICAL SETTLEMENT PROFESSIONALS, INCORPORATED

Movant

No. 06-1371
3:05-cv-00368-HEH

LIFE PARTNERS, INCORPORATED

Plaintiff – Appellee

v.

THEODORE V. MORRISON, JR.; MARK C. CHRISTIE, in their official capacities as Commissioner of the State Corporation Commission; ALFRED W. GROSS, in his official capacity as the Commissioner of Insurance; JUDITH WILLIAMS JAGDMANN, in her official capacity as Commissioner of the State Corporation Commission

Defendants – Appellants

and

CLINTON MILLER, in official capacity as Commissioner of the State Corporation Commission

Defendant

and

ROBERT F. MCDONNELL, in his official capacity as the Attorney General of the Commonwealth of Virginia

Intervenor – Defendant

NORTH AMERICA SECURITIES ADMINISTRATORS ASSOCIATION, INCORPORATED; NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

Amici Supporting Appellants

and

VIATICAL SETTLEMENT PROFESSIONALS, INCORPORATED

Movant

On Petition for Rehearing En Banc

The appellants' petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Niemeyer, Judge Michael, and Judge Traxler.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX D

CODE OF VIRGINIA

CHAPTER 60

VIATICAL SETTLEMENTS ACT.

§ 38.2-6000. Definitions.

As used in this chapter:

"*Advertising*" means any written, electronic, or printed communication or any communication by means of recorded telephone messages or transmitted on radio, television, the Internet, or similar communications media, including film strips, motion pictures, and videos published, disseminated, circulated or placed before the public, directly or indirectly, for the purpose of creating an interest in or inducing a person to sell a life insurance policy pursuant to a viatical settlement contract.

"*Business of viatical settlements*" means an activity involved in, but not limited to, the offering, solicitation, negotiation, procurement, effectuation, purchasing, investing, financing, monitoring, tracking, underwriting, selling, transferring, assigning, pledging, or hypothecating in any other manner, of viatical settlement contracts or purchase agreements.

"*Chronically ill*" means (i) being unable to perform at least two activities of daily living, which shall include eating, toileting, transferring, bathing, dressing or continence, (ii) re-

quiring substantial supervision by another person to protect the individual from threats to health and safety due to severe cognitive impairment, or (iii) having a level of disability similar to that described in clause (i) as determined by the federal Secretary of Health and Human Resources.

"*Financing entity*" means an underwriter, placement agent, lender, purchaser of securities, purchaser of a policy or certificate from a viatical settlement provider, credit enhancer, or any entity that has a direct ownership in a policy or certificate that is the subject of a viatical settlement contract, but whose principal activity related to the transaction is providing funds to effect the viatical settlement or purchase of one or more viaticated policies and who has an agreement in writing with one or more licensed viatical settlement providers to finance the acquisition of viatical settlement contracts. Financing entity does not include a non-accredited investor or viatical settlement purchaser.

"*Fraudulent viatical settlement act*" includes:

1. Acts or omissions committed by any person who, knowingly or with intent to defraud, for the purpose of depriving another of property or for pecuniary gain, commits or permits its employees or its agents to engage in acts including:

a. Presenting, causing to be presented or preparing with knowledge or belief that it will be presented to or by a viatical settlement provider, viatical settlement broker, viatical settlement purchaser, financing entity, insurer,

insurance producer, or any other person, false material information, or concealing material information, as part of, in support of, or concerning a fact material to one or more of the following: (i) an application for the issuance of a viatical settlement contract or insurance policy; (ii) the underwriting of a viatical settlement contract or insurance policy; (iii) a claim for payment or benefit pursuant to a viatical settlement contract or insurance policy; (iv) premiums paid on an insurance policy; (v) payments and changes in ownership or beneficiary made in accordance with the terms of a viatical settlement contract, or insurance policy; (vi) the reinstatement or conversion of an insurance policy; (vii) in the solicitation, offer, effectuation or sale of a viatical settlement contract or insurance policy; (viii) the issuance of written evidence of a viatical settlement contract or insurance policy; or (ix) a financing transaction;

b. Employing any device, scheme, or artifice to defraud related to viaticated policies;

2. In the furtherance of a fraud or to prevent the detection of a fraud any person commits or permits its employees or its agents to: (i) remove, conceal, alter, destroy, or sequester from the Commission the assets or records of a licensee or other person engaged in the business of viatical settlements; (ii) misrepresent or conceal the financial condition of a licensee, financing entity, insurer, or other person; (iii) transact the business of viatical settlements in violation of laws requiring a license, certificate of authority, or other legal authority for the transaction of the business of viatical settle-

ments; or (iv) file with the Commission or the chief insurance regulatory official of another jurisdiction a document containing false information or otherwise conceals information about a material fact from the Commission;

3. Embezzlement, theft, misappropriation or conversion of moneys, funds, premiums, credits, or other property of a viatical settlement provider, insurer, insured, viator, insurance policyowner, or any other person engaged in the business of viatical settlements or insurance;

4. Recklessly entering into, brokering, or otherwise dealing in a viatical settlement contract, the subject of which is a life insurance policy that was obtained by presenting false information concerning any fact material to the policy or by concealing, for the purpose of misleading another, information concerning any fact material to the policy, where the viator or the viator's agent intended to defraud the policy's issuer. "Recklessly" means engaging in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct; or

5. Attempting to commit, assisting, aiding or abetting in the commission of, or conspiracy to commit the acts or omissions specified in this subsection.

"*Licensee under this chapter*" means a person licensed by the Commission as a viatical settlement provider or viatical settlement broker.

"*NAIC*" means National Association of Insurance Commissioners.

"*Policy*" means an individual or group policy, group certificate, contract or arrangement of life insurance affecting the rights of a resident of this Commonwealth or bearing a reasonable relation to this Commonwealth, regardless of whether delivered or issued for delivery in this Commonwealth.

"*Related provider trust*" means a titling trust or other trust established by a licensed viatical settlement provider or a financing entity for the sole purpose of holding the ownership or beneficial interest in purchased policies in connection with a financing transaction. The trust shall have a written agreement with the licensed viatical settlement provider under which the licensed viatical settlement provider is responsible for ensuring compliance with all statutory and regulatory requirements and under which the trust agrees to make all records and files related to viatical settlement transactions available to the Commission as if those records and files were maintained directly by the licensed viatical settlement provider.

"*Special purpose entity*" means a corporation, partnership, trust, limited liability company, or other similar entity formed solely to provide either directly or indirectly access to institutional capital markets for a financing entity or licensed viatical settlement provider.

"*Terminally ill*" means having an illness or sickness that can reasonably be expected to result in death in 24 months or less.

"*Viatical settlement broker*" means a person that on behalf of another and for a fee, commission or other valuable consideration introduces viators to viatical settlement providers, or offers or attempts to negotiate viatical settlement contracts between a viator and one or more viatical settlement providers. A viatical settlement broker may act as agent for a viatical settlement provider or on behalf of the viator, provided that a viatical settlement broker shall not be deemed to act exclusively for the viator unless, pursuant to written agreement between the parties, the broker agrees (i) to disclose fully all interests in the viatical settlement contract and relationships with the viatical settlement provider, including its affiliates and appointed or contracted agents, and (ii) that compensation for services as a viatical settlement broker shall be paid directly and only by the viator. The term does not include an attorney, certified public accountant, or a financial planner accredited by a nationally recognized accreditation agency, who is retained to represent the viator and whose compensation is not paid directly or indirectly by the viatical settlement provider or viatical settlement purchaser.

"*Viatical settlement contract*" means a written agreement establishing the terms under which compensation or anything of value will be paid, which compensation or value is less than the expected death benefit of the insurance policy or certificate, in return for the viator's assignment, transfer, sale, devise or bequest of the death benefit or ownership of any portion of the insurance policy or certificate of insurance.

A viatical settlement contract also includes a contract for a loan or other financing transaction with a viator secured primarily by an individual or group life insurance policy, other than a loan by a life insurance company pursuant to the terms of the life insurance contract, or a loan secured by the cash value of a policy. A viatical settlement contract includes an agreement with a viator to transfer ownership or change the beneficiary designation at a later date regardless of the date that compensation is paid to the viator. "Viatical settlement contracts" do not include accelerated benefits provisions contained in life insurance policies, whether issued with the original policy or as a rider, according to the regulations promulgated by the Commission.

"*Viatical settlement provider*" means a person, other than a viator, that enters into or effectuates a viatical settlement contract. Viatical settlement provider does not include: (i) a bank, savings bank, savings and loan association, credit union, or other licensed lending institution that takes an assignment of a life insurance policy as collateral for a loan; (ii) the issuer of a life insurance policy providing accelerated benefits under § 38.2-3115.1 and pursuant to the contract; (iii) an authorized or eligible insurer that provides stop loss coverage to a viatical settlement provider, viatical settlement purchaser, financing entity, special purpose entity or related provider trust; (iv) a natural person who enters into or effectuates no more than one agreement in a calendar year for the transfer of life insurance policies for any value less than the expected death benefit;

(v) a financing entity; (vi) a special purpose entity; (vii) a related provider trust; (viii) a viatical settlement purchaser; or (ix) an accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended, and who purchases a viaticated policy from a viatical settlement provider and does not communicate with the viator or insured who is a resident of this Commonwealth except through a licensee under this chapter.

"*Viatical settlement purchaser*" means a person who gives a sum of money as consideration for a life insurance policy or an interest in the death benefits of a life insurance policy, or a person who owns or acquires or is entitled to a beneficial interest in a trust that owns a viatical settlement contract or is the beneficiary of a life insurance policy that has been or will be the subject of a viatical settlement contract, for the purpose of deriving an economic benefit. Viatical settlement purchaser does not include (i) a licensee under this chapter; (ii) an accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended; (iii) a financing entity; (iv) a special purpose entity; or (v) a related provider trust.

"*Viaticated policy*" means a life insurance policy or certificate that has been acquired by a viatical settlement provider pursuant to a viatical settlement contract.

"*Viator*" means the owner of a life insurance policy or a certificate holder under a group policy who enters or seeks to enter into a viatical settlement contract. For the purposes of this chapter and the application of Article 6.1 (§ 38.2-1865.1 *et seq.*) of Chapter 18 of this title, a viator shall not be limited to an owner of a life insurance policy or a certificate holder under a group policy insuring the life of an individual with a terminal or chronic illness except where specifically addressed. Viator does not include (i) a licensee under this chapter; (ii) an accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended; (iii) a financing entity; (iv) a special purpose entity; or (v) a related provider trust.

§ 38.2-6001. Viatical settlement brokers.

No person shall act as a viatical settlement broker with a resident of this Commonwealth without first obtaining a license from the Commission in accordance with Article 6.1 (§ 38.2-1865.1 *et seq.*) of Chapter 18 of this title. If there is more than one viator on a single policy, and the viators are residents of different states, the viatical settlement broker shall be required to hold a license in the state in which the viator having the largest percentage resides or, if the viators hold equal ownership, the viatical settlement broker shall be required to hold a license in the state of residence of one viator agreed upon in writing by all the viators.

§ 38.2-6002. Viatical settlement providers, license requirements.

A. No person shall act as a viatical settlement provider with a resident of this Commonwealth without first obtaining a license from the Commission.

1. A person seeking to be licensed as a viatical settlement provider in this Commonwealth shall apply for such license in a form acceptable to the Commission and shall pay to the Commission a nonrefundable application fee in an amount prescribed by the Commission. On and after July 1, 2003, such fee shall be not less than $300 and not more than $1,500. The application fee required by this subdivision shall be collected by the Commission, paid directly into the state treasury, and credited to the "Bureau of Insurance Special Fund—State Corporation Commission" for the maintenance of the Bureau of Insurance as provided in subsection B of § 38.2-400.

2. A license issued anytime prior to July 1, 2004, shall expire on June 30, 2004, unless renewed as set forth herein.

3. On or before March 1 of each year commencing March 1, 2004, a licensed viatical settlement provider shall remit a renewal application form and nonrefundable renewal fee in the form and amount prescribed by the Commission. Such fee shall be not less than $300 and not more than $1,500. The renewal fee required by this subdivision shall be collected by the Commission and paid directly into the state treasury and credited to the "Bureau of Insurance Special Fund—State Corporation

Commission" for the maintenance of the Bureau of Insurance as provided in subsection B of § 38.2-400.

4. A viatical settlement provider's license expiring on June 30 may be renewed on July 1 for a one-year period ending on June 30 of the following year if the required renewal application and a nonrefundable renewal fee have been received and the license is not terminated, suspended, or revoked at the time of renewal. The renewal fee required by this subdivision shall be collected by the Commission and paid directly into the state treasury and credited to the "Bureau of Insurance Special Fund—State Corporation Commission" for the maintenance of the Bureau of Insurance as provided in subsection B of § 38.2-400.

B. The applicant shall provide information on forms required by the Commission. The Commission shall have authority, at any time, to require the applicant to disclose fully the identity of all stockholders, partners, officers, members, and employees, and the Commission may, in the exercise of the Commission's discretion, refuse to issue a license in the name of a legal entity if not satisfied that any officer, employee, stockholder, partner, or member thereof who may materially influence the applicant's conduct meets the standards of this chapter.

C. A license issued to a legal entity authorizes all partners, officers, members, and designated employees to act as the viatical settlement provider under the license, and all those per-

sons shall be named in the application and any application supplements.

D. Upon the filing of an application and the payment of the nonrefundable application fee, the Commission shall make such investigation of each applicant as the Commission may determine to be appropriate and issue a license if it finds that the applicant: (i) has provided a detailed plan of operation; (ii) is competent and trustworthy; (iii) indicates its intention to act in good faith within the confines of the license; (iv) has a good business reputation; (v) if an individual, has had experience, training or education that qualifies him for licensure; (vi) if a resident partnership, limited liability company, or corporation, has recorded the existence of the partnership, limited liability company, or corporation pursuant to law; (vii) if a corporation, has specific authority to act as a viatical settlement provider in its charter; (viii) if a nonresident partnership, limited liability company, or corporation, has furnished proof of its authority to transact business in Virginia; and (ix) has provided an anti-fraud plan that meets the requirements of subdivision E 2 of § 38.2-6011.

E. If the applicant for a viatical settlement provider license is a nonresident, such applicant, as a condition precedent to receiving or holding a license, shall designate a resident of this Commonwealth as the person upon whom any process, notices, or order required or permitted by law to be served upon such nonresident viatical settlement provider may be served; and such licensee shall promptly notify the clerk of the Commission in writing of every

change in its designated agent for service of process, and such change shall not become effective until acknowledged by the Commission. Whenever a nonresident viatical settlement provider transacting business in this Commonwealth fails to appoint or maintain a registered agent in this Commonwealth, or whenever its registered agent cannot with reasonable diligence be found at the registered office, the clerk of the Commission shall be an agent of the nonresident upon whom service may be made in accordance with § 12.1-19.1.

F. A licensed insurer shall be prohibited from transacting the business of a viatical settlement provider.

G. The Commission may suspend, revoke, refuse to issue, or refuse to renew the license of a viatical settlement provider if the Commission finds that the applicant or licensee has (i) made any material misrepresentation in the application; (ii) been guilty of fraudulent or dishonest practices; (iii) been subject to a final administrative action or has otherwise been shown to be untrustworthy or incompetent to act as a viatical settlement provider; (iv) demonstrated a pattern of unreasonable payments to viators; (v) been convicted of a felony or any misdemeanor involving fraud or moral turpitude; (vi) entered into any viatical settlement contract that has not been approved pursuant to this chapter; (vii) failed to honor contractual obligations set out in a viatical settlement contract; (viii) demonstrated or represented that it no longer meets the requirements for initial licensure; (ix) has assigned, transferred, or pledged a viaticated policy to a person other

than a viatical settlement provider licensed in this Commonwealth, viatical settlement purchaser, an accredited investor, or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended, financing entity, special purpose entity, or related provider trust; (x) violated any provisions of this chapter or other applicable provisions of this title or has in its employ or organization any officer, partner, member, or key management personnel who has violated any provision of this chapter or other applicable provisions of this title; or (xi) has renewed or requested renewal of its license before implementing the anti-fraud initiatives required by subsection E of § 38.2-6011.

H. No applicant to whom a license is refused after a hearing, nor any licensee whose license is revoked, shall apply again for a license under this chapter until after the expiration of a period of five years from the date of the Commission's order, or such other period of time as the Commission prescribes in its order.

I. A viatical settlement provider shall be bonded as required by the Commission. Rules issued pursuant to § 38.2-6014 may identify other mechanisms for financial accountability.

§ 38.2-6003. Approval of viatical settlement contracts and disclosure statements.

A. A person shall not use a viatical settlement contract or provide to a viator a disclosure statement form in this Commonwealth unless filed with and approved by the Commission in accordance with procedures set forth in § 38.2-

316. In the absence of more specific regulation or rules promulgated by the Commission for the business of viatical settlements, standards and requirements of general application set forth in § 38.2-316 and rules promulgated thereunder shall be deemed applicable to viatical settlement contracts and disclosure statement forms, required by this chapter.

B. At the Commission's discretion, the Commission may require the submission of advertising material used or intended for use in this Commonwealth.

§ 38.2-6004. Reporting requirements.

A. Each licensee under this chapter shall file with the Commission on or before March 1 of each year the certification required by subsection E of § 38.2-6011 and an annual report containing such information as the Commission may prescribe by rule or regulation; however, such information shall be limited to only those transactions where the viator is a resident of this Commonwealth.

B. A viatical settlement provider shall report in writing to the Commission the following:

1. New or revised information about its officers, stockholders owning 10 percent or greater interest in the licensee or an affiliate of the licensee, partners, directors, members, or designated employees within 30 calendar days of the change;

2. Any change in business or residence address or name within 30 calendar days of the change.

C. A licensed viatical settlement provider convicted of a felony shall report within 30 calen-

dar days to the Commission the facts and circumstances regarding the criminal conviction.

§ 38.2-6005. Privacy.

Except as otherwise allowed or required by law, a viatical settlement provider, viatical settlement broker, insurance company, insurance producer, information bureau, rating agency or company, or any other person with actual knowledge of an insured's identity, shall not disclose that identity as an insured, or the insured's financial or medical information to any other person unless the disclosure:

1. Is necessary to effect a viatical settlement between the viator and a viatical settlement provider and the viator and insured have provided prior written consent to the disclosure;

2. Is provided in response to an investigation or examination by the Commission or another governmental agency or officer or pursuant to the requirements of subsection C of § 38.2-6011;

3. Is a term of or condition to the transfer of a policy by one viatical settlement provider to another viatical settlement provider;

4. Is necessary to permit a financing entity, related provider trust, or special purpose entity to finance the purchase of policies by a viatical settlement provider and the viator and insured have provided prior written consent to the disclosure;

5. Is necessary to allow the viatical settlement provider or viatical settlement broker or their authorized representatives to make contacts

for the purpose of determining health status; or

6. Is required to purchase stop loss coverage.

§ 38.2-6006. Examinations; record retention; investigations.

A. Viatical settlement providers, viatical settlement brokers, and persons seeking a license under this title to transact the business of viatical settlements in this Commonwealth shall be subject to examination by the Commission pursuant to Article 4 (§ 38.2-1317 *et seq.*) of Chapter 13 of this title. For purposes of completing such examination, the Commission may examine or investigate any person, or the business of any person, insofar as the examination or investigation is, in the sole discretion of the Commission, necessary or material to the examination of a licensee.

B. A person required to be licensed by this chapter shall for five years retain copies of (i) all proposed, offered or executed contracts, purchase agreements, underwriting documents, policy forms, and applications from the date of the proposal, offer or execution of the contract or purchase agreement, whichever is later; (ii) all checks, drafts or other evidence and documentation related to the payment, transfer, deposit, or release of funds from the date of the transaction; and (iii) all other records and documents related to the requirements of this chapter or Article 6.1 (§ 38.2-1865.1 *et seq.*) of Chapter 18 of this title. This section does not relieve a person of the obligation to produce these documents to the Commission after the retention period has expired if the person has

retained the documents. Records required to be retained by this section must be legible and complete and may be retained in paper, photograph, microprocess, magnetic, mechanical, or electronic media, or by any process that accurately reproduces or forms a durable medium for the reproduction of a record.

C. The Commission may investigate suspected fraudulent viatical settlement acts and persons engaged or alleged to be engaged in the business of viatical settlements.

§ 38.2-6007. Disclosure.

A. Before asking a viator or insured to sign any document, a licensee under this chapter shall provide the respective viator or insured, or both, with a copy of the disclosure document described in this subsection. The viatical settlement provider or viatical settlement broker shall provide the viator with an additional copy of the disclosures, with the application, no later than the time the application for the viatical settlement contract is signed by all parties. The disclosures shall be provided in a separate document that is signed by the viator and the viatical settlement provider or viatical settlement broker, and shall provide the following information:

1. There are possible alternatives to viatical settlement contracts including any accelerated death benefits or policy loans offered under the viator's life insurance policy.

2. Some or all of the proceeds of the viatical settlement may be taxable under federal income tax and state franchise and income taxes,

and assistance should be sought from a professional tax advisor.

3. Proceeds of the viatical settlement could be subject to the claims of creditors.

4. Receipt of the proceeds of a viatical settlement may adversely affect the viator's eligibility for Medicaid or other government benefits or entitlements, and advice should be obtained from the appropriate government agencies.

5. The viator has the right to rescind a viatical settlement contract for 15 calendar days after the receipt of the viatical settlement proceeds by the viator, as provided in subsection C of § 38.2-6008. If the insured dies during the rescission period, the settlement contract shall be deemed to have been rescinded, subject to repayment of all viatical settlement proceeds and any premiums, loans, and loan interest to the viatical settlement provider or viatical settlement purchaser.

6. Funds will be sent to the viator within three business days after the viatical settlement provider has received the insurer's or group administrator's acknowledgment that ownership of the policy or interest in the certificate has been transferred and the beneficiary has been designated.

7. Entering into a viatical settlement contract may cause other rights or benefits, including conversion rights and waiver of premium benefits that may exist under the policy or certificate, to be forfeited by the viator. Assistance should be sought from a financial adviser.

8. Disclosure to a viator shall include distribution of a brochure describing the process of vi-

atical settlements. The NAIC's form for the brochure shall be used unless one is developed by the Commission.

9. The disclosure document shall contain the following language: "All medical, financial, or personal information solicited or obtained by a viatical settlement provider or viatical settlement broker about an insured, including the insured's identity or the identity of family members, a spouse, or a significant other may be disclosed as necessary to effect the viatical settlement between the viator and the viatical settlement provider. If you are asked to provide this information, you will be asked to consent to the disclosure. The information may be provided to someone who buys the policy or provides funds for the purchase. You may be asked to renew your permission to share information every two years."

10. The insured may be contacted by either the viatical settlement provider or broker or its authorized representative for the purpose of determining the insured's health status. This contact is limited to once every three months if the insured has a life expectancy of more than one year, and no more than once per month if the insured has a life expectancy of one year or less.

B. A viatical settlement provider shall provide the viator with at least the following disclosures no later than the date the viatical settlement contract is signed by all parties. The disclosures shall be conspicuously displayed in the viatical settlement contract or in a separate document signed by the viator and the vi-

atical settlement provider or viatical settlement broker, and provide the following information:

1. The affiliation, if any, between the viatical settlement provider and the issuer of the insurance policy to be viaticated;

2. The name, address, and telephone number of the viatical settlement provider;

3. The dollar amount of the current death benefit payable to the viatical settlement provider under the policy or certificate. If known, the viatical settlement provider shall also disclose the availability of any additional guaranteed insurance benefits, the dollar amount of any accidental death and dismemberment benefits under the policy or certificate, and the viatical settlement provider's interest in those benefits;

4. State the name, business address, and telephone number of the independent third party escrow agent, and the fact that the viator or owner may inspect or receive copies of the relevant escrow or trust agreements or documents; and

5. If an insurance policy to be viaticated has been issued as a joint policy or involves family riders or any coverage of a life other than the insured under the policy to be viaticated, the viator shall be informed of the possible loss of coverage on the other lives under the policy and shall be advised to consult with his insurance producer or the insurer issuing the policy for advice on the proposed viatical settlement.

C. If the provider transfers ownership or changes the beneficiary of the insurance policy,

the provider shall communicate the change in ownership or beneficiary to the insured within 20 days after the change.

§ 38.2-6008. General rules.

A. A viatical settlement provider entering into a viatical settlement contract shall:

1. First obtain:

a. If the viator is the insured, a written statement from a licensed attending physician that the viator is of sound mind and under no constraint or undue influence to enter into a viatical settlement contract; and

b. A document in which the insured consents to the release of his medical records to a viatical settlement provider, viatical settlement broker, and the insurance company that issued the life insurance policy covering the life of the insured. The consent for the release of medical records shall only be obtained for the insurance company if the life insurance policy covering the insured was issued within 48 months of the date of the viator's application for the viatical settlement contract.

2. Within 20 days after a viator executes documents necessary to transfer any rights under an insurance policy or within 20 days of entering any agreement, option, promise or any other form of understanding, expressed or implied, to viaticate the policy, the viatical settlement provider shall give written notice to the insurer that issued that insurance policy that the policy has or will become a viaticated policy. The notice shall be accompanied by the documents required by subdivision 3.

3. The viatical settlement provider shall deliver a copy of the medical release required under subdivision 1 b of this subsection, a copy of the viator's application for the viatical settlement contract, the notice required under subdivision 2, and a request for verification of coverage to the insurer that issued the life policy that is the subject of the viatical transaction. The verification form adopted by the NAIC shall be used unless standards for verification are developed by the Commission.

4. The insurer shall respond to a request for verification of coverage submitted on an approved form by a viatical settlement provider not later than 30 calendar days after the date the request is received. The insurer shall complete and issue the verification of coverage to the viatical settlement provider or, in its response, the insurer shall indicate whether, based on the medical evidence and documents provided, the insurer intends to pursue an investigation regarding possible fraud or the validity of the insurance contract.

5. Prior to or at the time of execution of the viatical settlement contract, the viatical settlement provider shall obtain a witnessed document in which the viator consents to the viatical settlement contract, represents that the viator has a full and complete understanding of the viatical settlement contract, that he has a full and complete understanding of the benefits of the life insurance policy, acknowledges that he is entering into the viatical settlement contract freely and voluntarily and, for persons who are chronically or terminally ill, acknowledges that the insured has a terminal or

chronic illness and that the terminal or chronic illness or condition was diagnosed after the life insurance policy was issued.

6. If a viatical settlement broker performs any of these activities required of the viatical settlement provider, the provider is deemed to have fulfilled the requirements of this section.

B. All medical information solicited or obtained by any licensee shall be subject to the applicable provisions of state law relating to privacy or confidentiality of medical information.

C. All viatical settlement contracts entered into in this Commonwealth shall provide the viator with an unconditional right to rescind the contract for at least 15 calendar days from the receipt of the viatical settlement proceeds. If the insured dies during the rescission period, the viatical settlement contract shall be deemed to have been rescinded, subject to repayment to the viatical settlement provider or purchaser of all viatical settlement proceeds, and any premiums, loans, and loan interest that have been paid by the viatical settlement provider or purchaser.

D. The viatical settlement provider shall instruct the viator to send the executed documents required to effect the change in ownership, assignment or change in beneficiary directly to the independent escrow agent. Within three business days after the date the escrow agent receives the documents, or from the date the viatical settlement provider receives the documents, if the viator erroneously provides the documents directly to the provider, the

provider shall pay or transfer the proceeds of the viatical settlement into an escrow or trust account maintained in a state or federally-chartered financial institution whose deposits are insured by the Federal Deposit Insurance Corporation. Upon payment of the settlement proceeds into the escrow account, the escrow agent shall deliver the original change in ownership, assignment, or change in beneficiary forms to the viatical settlement provider or related provider trust. Upon the escrow agent's receipt of the acknowledgment of the properly completed transfer of ownership, assignment, or designation of beneficiary from the insurance company, the escrow agent shall pay the settlement proceeds to the viator.

E. Failure to tender consideration to the viator for the viatical settlement contract within the time disclosed pursuant to subdivision A 6 of § 38.2-6007 renders the viatical settlement contract voidable by the viator for lack of consideration until the time consideration is tendered to and accepted by the viator.

F. Contacts with the insured for the purpose of determining the health status of the insured by the viatical settlement provider or viatical settlement broker after the viatical settlement has occurred shall only be made by the viatical settlement provider or broker licensed in this Commonwealth or its authorized representatives and shall be limited to once every three months for insureds with a life expectancy of more than one year, and to no more than once per month for insureds with a life expectancy of one year or less. The provider or broker shall explain the procedure for these contacts

at the time the viatical settlement contract is entered into. The limitations set forth in this subsection shall not apply to any contacts with an insured for reasons other than determining the insured's health status. Viatical settlement providers and viatical settlement brokers shall be responsible for the actions of their authorized representatives.

§ 38.2-6009. Prohibited practices.

A. It is a violation of this chapter for any person to enter into a viatical settlement contract within a two-year period commencing with the date of issuance of the insurance policy or certificate unless the viator certifies to the viatical settlement provider that one or more of the following conditions have been met within the two-year period:

1. The policy was issued upon the viator's exercise of conversion rights arising out of a group or individual policy, provided the total of the time covered under the conversion policy plus the time covered under the prior policy is at least 24 months. The time covered under a group policy shall be calculated without regard to any change in insurance carriers, provided the coverage has been continuous and under the same group sponsorship;

2. The viator submits independent evidence to the viatical settlement provider that one or more of the following conditions have been met within the two-year period:

a. The insured is terminally or chronically ill, or

b. The viator or insured disposes of his ownership interests in a closely held corporation

pursuant to terms of a buyout or other similar agreement in effect at the time the insurance policy was initially issued.

B. Copies of the certifications and independent evidence required by this subsection and documents required by subsection A of § 38.2-6008 shall be submitted to the insurer when the viatical settlement provider submits a request to the insurer for verification of coverage. The copies shall be accompanied by a letter of attestation from the viatical settlement provider that the copies are true and correct copies of the documents received by the viatical settlement provider.

§ 38.2-6010. Advertising for viatical settlements.

A. This section shall apply to any advertising of viatical settlement contracts, or related products or services intended for dissemination in this Commonwealth, including Internet advertising viewed by persons located in this Commonwealth. Where disclosure requirements are established pursuant to federal regulation, this section shall be interpreted so as to minimize or eliminate conflict with federal regulation wherever possible.

B. Each licensee under this chapter shall establish and at all times maintain a system of control over the content, form and method of dissemination of all advertisements of its contracts, products, and services. All advertisements, regardless of by whom written, created, designed, or presented, shall be the responsibility of the licensee, as well as the individual who created or presented the advertisement. A

system of control shall include regular routine notification, at least once a year, to agents and others authorized by the licensee who disseminates advertisements of the requirements and procedures for approval prior to the use of any advertisements not furnished by the licensee.

C. Advertisements shall be truthful and not misleading in fact or by implication. The form and content of an advertisement of a viatical settlement contract shall be sufficiently complete and clear so as to avoid deception. It shall not have the capacity or tendency to mislead or deceive. Whether an advertisement has the capacity or tendency to mislead or deceive shall be determined by the Commission from the overall impression that the advertisement may be reasonably expected to create upon a person of average education or intelligence within the segment of the public to which it is directed.

D. The information required to be disclosed under this section shall not be minimized, rendered obscure, or presented in an ambiguous fashion or intermingled with the text of the advertisement so as to be confusing or misleading.

1. An advertisement shall not omit material information or use words, phrases, statements, references, or illustrations if the omission or use has the capacity, tendency, or effect of misleading or deceiving viators, as to the nature or extent of any benefit, loss covered, premium payable, or state or federal tax consequence. The fact that the viatical settlement contract offered is made available for inspection prior to

consummation of the sale, or an offer is made to refund the payment if the viator is not satisfied or that the viatical settlement contract includes a "free look" period that satisfies or exceeds legal requirements, does not remedy misleading statements.

2. An advertisement shall not use the name or title of a life insurance company or a life insurance policy unless the advertisement has been approved by the insurer.

3. An advertisement shall not state or imply that interest charged on an accelerated death benefit or a policy loan is unfair, inequitable, or in any manner an incorrect or improper practice.

4. The words "free," "no cost," "without cost," "no additional cost," "at no extra cost," or words of similar import shall not be used with respect to any benefit or service unless true. An advertisement may specify the charge for a benefit or a service or may state that a charge is included in the payment or use other appropriate language.

5. Testimonials, appraisals, or analysis used in advertisements must be genuine; represent the current opinion of the author; be applicable to the viatical settlement contract, product, or service advertised, if any; and be accurately reproduced with sufficient completeness to avoid misleading or deceiving prospective viators as to the nature or scope of the testimonials, appraisal, analysis, or endorsement. In using testimonials, appraisals, or analysis, the viatical settlement licensee makes as its own all the statements contained therein, and the

statements are subject to all the provisions of this section.

a. If the individual making a testimonial, appraisal, analysis, or an endorsement has a financial interest in the viatical settlement provider, viatical settlement broker, or related entity as a stockholder, director, officer, employee, or otherwise, or receives any benefit directly or indirectly other than required union scale wages, that fact shall be prominently disclosed in the advertisement.

b. An advertisement shall not state or imply that a viatical settlement contract benefit or service has been approved or endorsed by a group of individuals, society, association, or other organization unless that is the fact and unless any relationship between an organization and the viatical settlement licensee is disclosed. If the entity making the endorsement or testimonial is owned, controlled, or managed by the viatical settlement licensee, or receives any payment or other consideration from the viatical settlement licensee for making an endorsement or testimonial, that fact shall be disclosed in the advertisement.

c. When an endorsement refers to benefits received under a viatical settlement contract all pertinent information shall be retained for a period of five years after its use.

E. An advertisement shall not contain statistical information unless it accurately reflects recent and relevant facts. The source of all statistics used in an advertisement shall be identified.

F. An advertisement shall not disparage insurers, viatical settlement providers, viatical settlement brokers, viatical settlement investment agents, insurance producers, policies, services, or methods of marketing.

G. The name of the viatical settlement licensee shall be clearly identified in all advertisements about the licensee or its viatical settlement contracts, products, or services, and if any specific viatical settlement contract is advertised, the viatical settlement contract shall be identified either by form number or some other appropriate description. If an application is part of the advertisement, the name of the viatical settlement provider shall be shown on the application.

H. An advertisement shall not use a trade name, group designation, name of the parent company of a viatical settlement licensee, name of a particular division of the viatical settlement licensee, service mark, slogan, symbol, or other device or reference without disclosing the name of the viatical settlement licensee, if the advertisement would have the capacity or tendency to mislead or deceive as to the true identity of the viatical settlement licensee, or to create the impression that a company other than the viatical settlement licensee would have any responsibility for the financial obligation under a viatical settlement contract.

I. An advertisement shall not use any combination of words, symbols, or physical materials that by their content, phraseology, shape, color, or other characteristics are so similar to

a combination of words, symbols, or physical materials used by a government program or agency or otherwise appear to be of such a nature that they tend to mislead prospective viators into believing that the solicitation is in some manner connected with a government program or agency.

J. An advertisement may state that a viatical settlement licensee is licensed in the state where the advertisement appears, provided it does not exaggerate that fact or suggest or imply that a competing viatical settlement licensee may not be so licensed. The advertisement may ask the audience to consult the licensee's website or contact the Bureau of Insurance to find out if this Commonwealth requires licensing and, if so, whether the viatical settlement provider or viatical settlement broker is licensed.

K. An advertisement shall not create the impression that the viatical settlement provider, its financial condition or status, the payment of its claims or the merits, desirability, or advisability of its viatical settlement contracts are recommended or endorsed by any government entity.

L. The name of the actual licensee shall be stated in all of its advertisements. An advertisement shall not use a trade name, any group designation, name of any affiliate, or controlling entity of the licensee, service mark, slogan, symbol, or other device in a manner that would have the capacity or tendency to mislead or deceive as to the true identity of the actual licensee or create the false impression that an

affiliate or controlling entity would have any responsibility for the financial obligation of the licensee.

M. An advertisement shall not directly or indirectly create the impression that any division or agency of the state or of the U.S. government endorses, approves, or favors:

1. Any viatical settlement licensee or its business practices or methods of operation;

2. The merits, desirability, or advisability of any viatical settlement contract;

3. Any viatical settlement contract; or

4. Any life insurance policy or life insurance company.

N. If the advertiser emphasizes the speed with which the viatication will occur, the advertising must disclose the average time frame from completed application to the date of offer and from acceptance of the offer to receipt of the funds by the viator.

O. If the advertising emphasizes the dollar amounts available to viators, the advertising shall disclose the average purchase price as a percent of face value obtained by viators contracting with the licensee during the past six months.

§ 38.2-6011. Fraud prevention and control.

A. A person shall not commit a fraudulent viatical settlement act. A person shall not knowingly or intentionally interfere with the enforcement of the provisions of this chapter or Article 6.1 (§ 38.2-1865.1 *et seq.*) of Chapter 18 of this title or investigations of suspected or actual violations of this chapter or Article 6.1

(§ 38.2-1865.1 *et seq.*) of Chapter 18 of this title. A person in the business of viatical settlements shall not knowingly or intentionally permit any person convicted of a felony involving dishonesty or breach of trust to participate in the business of viatical settlements.

B. Viatical settlement contracts and applications for viatical settlements, regardless of the form of transmission, shall contain the following statement or a substantially similar statement: "Any person who knowingly presents false information in an application for insurance or viatical settlement contract may be guilty of a crime and subject to prosecution." The lack of the required statement does not constitute a defense in any prosecution for a fraudulent viatical settlement act.

C. Any person engaged in the business of viatical settlements having knowledge or a reasonable belief that a fraudulent viatical settlement act is being, will be, or has been committed shall provide to the Commission the information required by, and in a manner prescribed by, the Commission. Any other person having knowledge or a reasonable belief that a fraudulent viatical settlement act is being, will be, or has been committed may provide to the Commission the information required by, and in a manner prescribed by, the Commission.

D. This chapter shall not:

1. Preempt the authority or relieve the duty of other law enforcement or regulatory agencies to investigate, examine, and prosecute suspected violations of law;

2. Prevent or prohibit a person from disclosing voluntarily information concerning viatical settlement fraud to a law enforcement or regulatory agency other than the insurance department; or

3. Limit the powers granted elsewhere by the laws of this Commonwealth to the Commission or an insurance fraud unit to investigate and examine possible violations of law and to take appropriate action against wrongdoers.

E. A licensee under this chapter shall within 60 days of licensure and annually thereafter by March 1 of each year certify to the Commission implementation of anti-fraud initiatives reasonably calculated to detect, prosecute, and prevent fraudulent viatical settlement acts. Anti-fraud initiatives shall include:

1. Fraud investigators, who may be viatical settlement providers or viatical settlement broker employees or independent contractors; and

2. An anti-fraud plan, which shall include, but not be limited to:

a. A description of the procedures for detecting and investigating possible fraudulent viatical settlement acts and procedures for resolving material inconsistencies between medical records and insurance applications;

b. A description of the procedures for reporting possible fraudulent viatical settlement acts to the Commission;

c. A description of the plan for anti-fraud education and training of underwriters and other personnel; and

d. A description or chart outlining the organizational arrangement of the anti-fraud personnel who are responsible for the investigation and reporting of possible fraudulent viatical settlement acts and investigating unresolved material inconsistencies between medical records and insurance applications.

F. Anti-fraud plans submitted to or obtained by the Commission and in the control or possession of the Commission shall be privileged and confidential, shall not be subject to inspection or review by the general public, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil or criminal action. However, the Commission is authorized to use the anti-fraud plans in the furtherance of any regulatory or legal action brought as a part of the Commission's duties.

§ 38.2-6012. Civil remedies.

A. Any person damaged by the acts of a person in violation of this chapter may bring a civil action against the person committing the violation in a court of competent jurisdiction.

B. The Commission shall have no jurisdiction to adjudicate controversies between licensees, or between a licensee under this chapter and a viator or an insured.

C. If there is more than one viator on a single policy and the viators are residents of different states, contractual disputes arising from the viatical settlement shall be governed by the law of the state in which the viator having the largest percentage ownership resides or, if the viators hold equal ownership, the state of resi-

dence of one viator agreed upon in writing by all viators, provided that the application of another state's laws shall not impair or limit the ability of the Commission to apply and enforce the provisions of this chapter or Article 6.1 (§ 38.2-1865.1 *et seq.*) of Chapter 18 of this title in its regulation of transactions with a resident of this Commonwealth.

§ 38.2-6013. Unfair trade practices.

A violation of this chapter shall be considered an unfair trade practice under Chapter 5 (§ 38.2-500 *et seq.*) of this title and subject to the penalties contained in that chapter.

§ 38.2-6014. Commission authority.

Pursuant to the authority granted by § 38.2-223, the Commission may promulgate such rules and regulations as it may deem necessary to implement this chapter, including, but not limited to:

1. Establishing standards for evaluating reasonableness of payments under viatical settlement contracts for insureds who are terminally or chronically ill. This authority includes, but is not limited to, regulation of discount rates used to determine the amount paid in exchange for assignment, transfer, sale, devise, or bequest of a benefit under a life insurance policy. Viatical settlement providers, where the insured is not terminally ill or chronically ill, shall pay an amount greater than the cash surrender value or accelerated death benefit then available;

2. Establish appropriate licensing requirements, fees, and standards for continued licen-

sure for viatical settlement providers and viatical settlement brokers;

3. Requiring and setting the amount of any bond or other mechanism for financial accountability for viatical settlement providers and viatical settlement brokers; and

4. Adopting rules governing the relationship and responsibilities of both insurers and viatical settlement providers and viatical settlement brokers during the viatication of a life insurance policy or certificate.

§ 38.2-6015. Immunity from liability.

A. No cause of action shall arise nor shall any liability be imposed against the Commission, the Commissioner of Insurance, or any of the Commission's employees or agents, for any statements made or conduct performed in good faith while carrying out the provisions of this chapter or Article 6.1 (§ 38.2-1865.1 *et seq.*) of Chapter 18 of this title.

B. No cause of action shall arise, nor shall any liability be imposed against any person for the act of communicating or delivering information or data to the Commission, if the act of communication or delivery was performed in good faith and without fraudulent intent or the intent to deceive.

C. No civil liability shall be imposed on and no cause of action shall arise from a person's furnishing information concerning suspected, anticipated, or completed fraudulent viatical settlement acts or suspected or completed fraudulent insurance acts, if the information is provided to or received from:

1. The Commission, the Commissioner of Insurance, or any of the Commission's employees or agents;

2. Federal, state, or local law enforcement or regulatory officials or their employees, agents or representatives;

3. A person involved in the prevention and detection of fraudulent viatical settlement acts or that person's agents, employees, or representatives;

4. The NAIC, National Association of Securities Dealers, the North American Securities Administrators Association, or their employees, agents or representatives, or other regulatory body overseeing life insurance, viatical settlements, securities, or investment fraud;

5. The life insurer that issued the life insurance policy covering the life of the insured; or

6. Any licensee under this chapter, provided the information furnished shall not be utilized as grounds to excuse the direct actions of such licensee.

D. Immunity provided by subsection C shall not apply to statements made with actual malice. In an action brought against a person for filing a report or furnishing other information concerning a fraudulent viatical settlement act or a fraudulent insurance act, the party bringing the action shall plead specifically any allegation that subsection C does not apply because the person filing the report or furnishing the information did so with actual malice.

E. This section does not abrogate or modify common law or statutory privileges or immuni-

ties enjoyed by a person described in subsections A or C.

F. The documents and evidence provided pursuant to this section or obtained by the Commission in an investigation of suspected or actual fraudulent viatical settlement acts shall be privileged and confidential and shall not be a public record and shall not be subject to discovery or subpoena in a private civil or criminal action.

G. Subsection F does not prohibit release by the Commission of documents and evidence obtained in an investigation of suspected or actual fraudulent viatical settlement acts:

1. In administrative or judicial proceedings to enforce laws administered by the Commission;

2. To federal, state, or local law enforcement or regulatory agencies, to an organization established for the purpose of detecting and preventing fraudulent viatical settlement acts or to the NAIC; or

3. At the discretion of the Commission, to a person in the business of viatical settlements that is aggrieved by a fraudulent viatical settlement act.

H. Release of documents and evidence under subsection G does not abrogate or modify the privilege granted in subsection F.

§ 38.2-6016. Applicability of securities laws.

Nothing in this chapter shall preempt or otherwise limit the provisions of the Virginia Securities Act (§ 13.1-501 *et seq.*), or any regulations, notices, bulletins or other interpretations issued by or through the Commission act-

ing pursuant to the Virginia Securities Act. Compliance with the provisions of this chapter shall not constitute compliance with any applicable provision of the Virginia Securities Act and any amendments thereto or any regulations, notices, bulletins, or other interpretations issued by or through the Commission acting pursuant to the Virginia Securities Act.

No. 07-261

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

LIFE PARTNERS, INC.,

Petitioner,

v.

THEODORE V. MORRISON, JR., MARK C. CHRISTIE, and JUDITH WILLIAMS JAGDMANN, in their official capacity as Commissioners of the Virginia State Corporation Commission, ALFRED W. GROSS, in his official capacity as Virginia Commissioner of Insurance, and ROBERT F. McDONNELL, in his official capacity as Attorney General of Virginia,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE VIRGINIA ATTORNEY GENERAL IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a business transaction alters the contractual obligations between the insurer and the insured in the context of viatical settlements, does the McCarran-Ferguson Act exempt the State's regulation of that transaction from Dormant Commerce Clause limitations?

2. If the McCarran-Ferguson Act does not exempt a State's statute regulating viatical settlements from Dormant Commerce Clause limitations, is the Virginia's regulation of viatical settlements consistent with the Dormant Commerce Clause?

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Virginia Attorney General Robert F. McDonnell, who intervened in the district court to defend the constitutionality of a Virginia statute, submits this Brief in Opposition.[1]

INTRODUCTION

This matter involves an as-applied constitutional challenge to Virginia's Viatical Settlements Act ("Virginia Act").[2] Because the Virginia Act directly regulates the relationship between the insurer and the insured, it is exempt from Dormant Commerce Clause scrutiny by the McCarran-Ferguson Act.[3] Even if the McCarran-Ferguson Act did not apply, the Virginia Act, which does not discriminate against interstate commerce on its face or in its practical effect, is constitutional.

Nevertheless, the Petitioner asks this Court to review the Fourth Circuit's judgment upholding the Virginia Act. There is no reason to do so. First, there is no conflict among the Circuits on the issue of whether the McCarran-Ferguson Act applies to the

[1] On September 7, 2007, this Court extended the time for such filing to and including October 29, 2007.

[2] *Virginia Code* §§ 38.2-6000 through 38.2-6015.

[3] 15 U.S.C. § 1012.

regulation of the relationship between the insurer and the insured in the viatical settlement context. While the Circuits have addressed the regulation of the investment aspect of viatical settlements, only the court below has addressed the insurance aspect of viatical settlements. Second, even if there were a conflict among the Circuits on the issue of whether the McCarran-Ferguson Act applies to the regulation of the altered relationship between the insurer and the insured in the viatical settlement context, the Virginia Act is consistent with the Dormant Commerce Clause. Thus, the judgment below is correct, albeit for a different reason. Certiorari should be denied.

STATEMENT OF THE CASE

1. A viatical settlement is a transaction in which a terminally ill or chronically ill person – a viator – sells the right to receive benefits under a life insurance policy for an amount less than the policy's face value. At the core of every viatical settlement is the contract between the insurer and the insured. "While obvious, it must first be stated that the subject of every viatical settlement is an insurance policy. Moreover, the viatical settlement is not collateral to the policy." *Pet. App.* 23a. Indeed, a viatical settlement actually "modifies" the insurance contract, thus "changing the parties' obligations and benefits, while yet leaving the insurance – i.e., the transfer of the specified risk – in

place." *Pet. App.* 23a-24a. "At its essence, a viatical settlement is a transaction that fractures the two-part insurance contract between the insurer and the insured and creates a new tripartite arrangement (albeit not a three-party agreement) among the insurer, the insured, and the insured's assignee – the viatical settlement provider." *Pet. App.* 24a. "Because of this new tripartite arrangement, each party has, with respect to the preexisting insurance contract, new or different obligations and benefits." *Pet. App.* 24a.

Since the "power imbalance between the viator and the provider creates a substantial potential for abuse," *Pet. App.* 7a, the States have passed laws and adopted regulations prohibiting unfair business practices. Recognizing "the need to protect viators and to create a transparent and fair viatical settlements market, the National Association of Insurance Commissioners developed the Viatical Settlements Model Act in 1993 and Viatical Settlements Regulation in 1994 to guide States in the regulation of the viatical settlements industry." *Pet. App.* 8a. The Virginia Act, which is based on the Model Act, was passed in 1997 to address Virginia's concern for the potential exploitation of vulnerable and seriously ill individuals. *Pet. App.* 9a.

The Petitioner, Life Partners, Inc. ("LPI") is a Texas-based viatical settlement provider that works with brokers to identify viators and arrange the purchase of the life insurance benefits of residents of

Virginia and other States. LPI is licensed in Texas, but not in Virginia.

2. In 2004, LPI worked with a broker, Ideal Settlements, Inc., to negotiate a viatical settlement with Jane Doe, a Virginia resident.[4] On behalf of a consortium of investors, LPI paid Jane Doe $29,900 for a life insurance policy with a face value of $115,000. LPI's physician examined Jane Doe's medical records and opined that her life expectancy was 6-18 months. Doe received 26% of the face value of her policy, far less than the 60% (life expectancy of 18 months) or 70% (life expectancy of 6 months) required by Virginia law.

After realizing that her payments from LPI were less than the minimum price prescribed by the Virginia Act, Doe filed a complaint with the Virginia State Bureau of Insurance ("Bureau"). The Bureau then asked the Virginia State Corporation Commission ("Commission") to issue a show cause

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[4] In order to consummate the transaction with Jane Doe, LPI had numerous contacts with Virginia. From Virginia, Doe forwarded her application to the broker. The broker in New Jersey called Doe in Virginia to communicate LPI's offers. From Virginia, Doe told her broker that she accepted the offer from LPI. LPI sent by Federal Express© a package to Doe in Virginia. LPI called Doe in Virginia several times, and from Virginia Doe called LPI. Doe received the contract in Virginia, accepted it in Virginia, signed the contract forms in Virginia, and from Virginia, Doe returned the package to LPI. LPI continues to monitor Virginia-resident Doe's medical condition. Indeed, there is no evidence that Doe ever left Virginia during the entire viatical transaction.

order directing LPI to respond to the allegation that it engaged in a viatical settlement with a Virginia resident without being licensed in Virginia as required by law.

3. After the Commission issued the show cause order, LPI filed suit in the district court against the individual members of the Commission, alleging that the Virginia Act was unconstitutional *as applied*. The Virginia Attorney General intervened to defend the constitutionality of the Virginia Act.[5]

The district court held that the Virginia Act, as applied to LPI, was consistent with the Dormant Commerce Clause. *Pet. App.* 39a-71a. In doing so, the court held that the Virginia laws are not "per se" invalid as they do not "directly affect" and/or "clearly discriminate against" interstate commerce. *Pet. App.* 57a-63a. Moreover, the district court held that the Virginia laws have a legitimate local purpose that outweighs any of the incidental burdens the laws impose. In particular, the Virginia Act "has a legitimate and important local purpose, namely, the protection of Virginia viators. It is obvious to the Court that a terminally-ill person with a life expectancy of twenty-four (24) months or less is in a particularly vulnerable position and could easily fall prey to sharp business practices and fraud." *Pet.*

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[5] Although the Virginia Attorney General represents most state agencies, courts, and executive branch officials, he does not represent the Commission or the Bureau.

App. 64a. Further, "nothing short of Virginia's comprehensive regulatory scheme, which couples licensing and registration with price controls, could provide a level playing field for its physically infirm citizens financially constrained to liquidate their life insurance policy." *Pet. App.* 70a. In finding that the Virginia laws did not violate the Dormant Commerce Clause, the district court did not reach the issue of whether the Virginia laws were exempt from such limitations by the McCarran-Ferguson Act. *Pet. App.* 51a.

4. LPI appealed the district court's conclusion that the Virginia Act is constitutional, and the Commissioners cross-appealed on the issue of whether the McCarran-Ferguson Act exempted the Virginia Act from Dormant Commerce Clause review. The Fourth Circuit, in an opinion written by Judge Niemeyer and joined by Judges Michael and Traxler, held that the McCarran-Ferguson Act applies and, thus, properly declined to address the constitutional issue. *Pet. App.* 1a-38a.

Specifically, the court of appeals had "little difficulty in concluding that the Virginia Viatical Settlements Act relates to the regulation of the business of insurance; was enacted for the purpose of regulating the business of insurance; and indeed regulates directly and substantially the actual business of insurance." *Pet. App.* 34a. "[T]he Virginia Viatical Settlements Act regulates directly the conduct and relationships of those traditionally

engaged in the insurance business – insurers and insureds." *Pet. App.* 32a. Rehearing *en banc* was unanimously denied. *Pet. App.* 72a-74a. The Petition followed.

REASONS FOR DENYING THE PETITION

Certiorari should be denied for two reasons. First, there is no conflict among the Circuits regarding the applicability of the McCarran-Ferguson Act to a State's regulation of the portion of a viatical settlement transaction that alters the relationship between the insurer and the insured. Indeed, the court of appeals noted that this case was one of first impression. *Pet. App.* 4a. In the absence of a conflict among the Circuits and in a situation where the lower court has upheld the state statute, this Court should decline review.

Second, because the Virginia Act is consistent with the Dormant Commerce Clause, there is an alternative ground for the judgment. The Virginia Act does not discriminate against interstate commerce on its face or in its practical effect. Moreover, the benefits of the statute – protecting terminally ill consumers – outweigh the burdens of LPI having to comply with Virginia law.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICABILITY OF THE McCARRAN-FERGUSON ACT TO TRANSACTIONS ALTERING THE RELATIONSHIP BETWEEN THE INSURER AND INSURED IN THE VIATICAL SETTLEMENT CONTEXT.

A. The McCarran-Ferguson Act Permits States to Regulate the Relationship between the Insurer and the Insured in the Viatical Settlement Context.

Congress, in the exercise of its power to regulate interstate commerce, may explicitly authorize the States to regulate interstate commerce. *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434 (1946).[6] This is exactly what Congress did when it enacted the McCarran-Ferguson Act. *See United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 507 (1993). The McCarran-Ferguson Act declares, "that the continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011.

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[6] *See also* 1 Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, 1242 (3d ed. 2000) (discussing the Court's decisions regarding congressional authorization of the States' regulation of interstate commerce). *Cf. United States v. Sharpnack*, 355 U.S. 286, 294 (1958) (upholding "a deliberate continuing adoption by Congress [of laws] as shall have been already put in effect by the respective States").

Moreover,

> [n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State *for the purpose of regulating the business of insurance*, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided [that the Antitrust Laws] shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

15 U.S.C. § 1012 (emphasis supplied). "The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement – these were the core of the 'business of insurance' under McCarran-Ferguson." *Securities & Exch. Comm'n v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). "[W]hatever the exact scope of the statutory term ['business of insurance'], it is clear where the focus was – it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating the relationship, directly or indirectly, are laws regulating the 'business of insurance.'" *Id.* As the court below explained, "direct regulations focused on selling insurance policies and the altering of insurance contracts" surely falls within the reach of the McCarran-Ferguson Act. *Pet. App.* 33a.

Furthermore, Congress intended for the McCarran-Ferguson Act to apply to the States' regulation of viatical settlements. When the viatical

settlement provider is licensed in the State where the insured resides, the Internal Revenue Code excludes the proceeds from the sale of a life insurance policy to a viatical settlement provider from taxable income. *See* 26 U.S.C. § 101(g)(2)(B)(i)(I). If the State in which the insured resides does not provide for the licensing of viatical settlement providers, the insured still receives the tax benefit if the viatical settlement provider meets the requirements of sections 8 and 9 of the Viatical Settlements Model Act as well as the requirements of the Model Regulations relating to standards for evaluation of reasonable payments. *See* 26 U.S.C. § 101(g)(2)(B)(ii)(I-II). By "amending the Tax Code in 1996, Congress did far more than just extend significant tax benefits to viators in § 101(g)(2). It made those tax benefits *contingent* upon the viatical settlement provider's compliance with *state* licensing requirements. . . . " *Pet. App.* 35a. "This incorporation of state regulation shows Congress' concern with the pitfalls of an unregulated viatical market. It also reveals congressional trust in regulatory measures to address these pitfalls. . . ." *Pet. App.* 35a.

B. Cases Regulating the Relationship Between the Insurer and a Third Party are Inapplicable to the Regulation of Viatical Settlements.

Relying on *Prudential Ins. Co. of America v. National Park Med. Ctr., Inc.*, 154 F.3d 812 (8th Cir. 1998), *Genord v. Blue Cross & Blue Shield of Michigan*, 440 F.3d 802 (6th Cir. 2006), and *Liberty*

Glass Co. v. Allstate Ins. Co., 607 F.2d 135 (5th Cir. 1979), LPI claims that there is a conflict among the Circuits on the issue resolved by the lower court. *Pet.* at 14-19. Yet, none of these cases deals with the relationship between the insurer and the insured. Rather, they involve the regulation of the relationship between the health care insurer and third parties such as health care providers. This Petition is distinguishable because viatical settlements directly impact the relationship of the insured person with the insurance company.

For example, in *National Park Med. Ctr., Inc.*, the Eighth Circuit found that an Arkansas law did not regulate the "business of insurance" because it did not "define the terms of the relationship between the insurer and the insured, but only the terms of the relationship between the insurer and a third party." *National Park Med. Ctr., Inc.*, 154 F.3d at 830. Similarly, in *Genord*, the state laws at issue regulated billing arrangements between insurance companies and health care providers. Since such arrangements had little, if any, impact on the insured, the court of appeals found that the state laws at issue did not regulate the business of insurance. Thus, the laws were not covered under the McCarran-Ferguson Act. *Genord*, 440 F.3d at 808. Finally, *Liberty Glass* did not involve a challenge to a state law, but a challenge to the alleged pricing and allocation arrangements between automobile insurance companies (the insurers) and third parties ("the manufacturer and

installer of automobile replacement glass"). *Liberty Glass*, 607 F.2d at 137. Although the court of appeals held that such arrangements did not constitute "the business of insurance" because they were "agreements between insurers and third party providers of goods and services," *Liberty Glass*, 607 F.2d at 137, that decision is inapplicable to an agreement that alters the relationship between the insured and her insurance company.

In sharp contrast, the Virginia Act regulates transactions involving the core of the relationship between the insurer and the insured. Indeed, "the viatical settlement is not collateral to the policy." *Pet. App.* 23a. "Rather, it modifies it, changing the parties' obligations and benefits, while yet leaving the insurance – i.e., the transfer of the specified risk – in place." *Pet. App.* 24a. "At its essence, a viatical settlement is a transaction that fractures the two-part insurance contract between the insurer and the insured and creates a new tripartite arrangement (albeit not a three-party agreement) among the insurer, the insured, and the insured's assignee – the viatical settlement provider." *Pet. App.* 23a. Specifically, the sale of a policy to a viatical provider alters three key elements of the insurer-insured relationship: (1) a new entity has the right to designate and change beneficiaries; (2) the recipient of life insurance proceeds has changed; and (3) responsibility for the payment of premiums has changed.

Moreover, a viatical transaction requires substantial direct communication among the insured, the provider, and the insurer. In particular, the insurer must scrutinize the transaction to make sure that the transfer is done lawfully, is free from fraud, and that it has accurate data on the new owner (or syndicate of owners) of the policy being sold.[7] Thus, the transactions regulated by the Virginia Act are at the core of the McCarran-Ferguson Act. The decision below dealt with a fundamentally different issue than *National Park Med. Ctr., Inc.*, *Genord*, and *Liberty Glass*. There is no conflict among the Circuits.

[7] Other changes in the insured-insurer relationship are noteworthy as well. "The insurer is faced with the newly divided obligations reflected in the interests of the insured and the viatical settlement provider." *Pet. App.* 24a. As for the insured, she "gives up her financial interest in the insurance contract, her life and the risk of her death remain the subject of the insurance contract." *Pet. App.* 24a. Once the viatical settlement agreement is completed, "the insurer, instead of carrying its obligation to pay on the insurance contact with an insured 'who guards against possible loss and disaster to [her] as an individual,' . . . carries its obligation with a viatical settlement provider, who hopes, for financial reasons, for the early death of the insured." *Pet. App.* 24a.

C. Cases Regulating the Investment Aspect of Viatical Settlements are Inapplicable to the Regulation of the Insurance Aspect of Viatical Settlements.

Contrary to the assertions of LPI, *Securities & Exch. Comm'n v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996), does not demonstrate a conflict between the Circuits. In that case, the court of appeals held that the SEC lacked authority to regulate the *investment* aspect of a viatical transaction, in which the provider sells interests in the policy it purchases to investors. Crucially, the case did not involve the *insurance* aspect of a viatical transaction or any effort to regulate the conduct of the provider and the viator. There is a fundamental difference between regulation of the securities aspect of viatical settlements and regulation of the insurance aspect – particularly when the insured sellers are a uniquely vulnerable population. Furthermore, the D.C. Circuit's decision "has not altogether been embraced by other circuits and continues to generate much discussion in the academic realm." *Wuliger v. Eberle,* 414 F. Supp. 2d 814, 822 (N.D. Ohio 2006). Indeed, at least one Circuit has rejected its reasoning. *See Securities & Exch. Comm'n v. Mutual Benefits Corp.*, 408 F.3d 737, 744 (11th Cir. 2005) (viatical settlements are investment contracts), *cert. dismissed*, 128 S. Ct. ___ (2007). Thus, this decision fails to demonstrate a conflict between the Circuits on the issue decided by the court below.

II. BECAUSE THE VIRGINIA ACT IS CONSISTENT WITH THE DORMANT COMMERCE CLAUSE, THERE IS AN ALTERNATIVE GROUND FOR THE LOWER COURT JUDGMENT.

Even if there were a conflict among the Circuits on the issue of whether the McCarran-Ferguson Act applies to the regulation of the relationship between the insurer and the insured in the viatical settlement context, this Petition would be a poor vehicle for resolving the dispute. Because the Virginia Viatical Settlement Act is consistent with the Dormant Commerce Clause, the lower court judgment is correct, albeit for a different reason.

Because "the peoples of the several states must sink or swim together," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935), the Commerce Clause[8] contains a "further, negative command, known as [the] [D]ormant [C]ommerce [C]lause," *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995), that "create[s] an area of trade free from interference by the States." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). Thus, a State may not prohibit the importation of another State's products. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978); *Baldwin*, 294 U.S. at 522-24. Nor may a State attempt to influence the price of products in another State. *See Healy v. Beer*

[8] U.S. Const. art. I, § 8, cl. 3.

Inst., Inc., 491 U.S. 324, 339 (1989). Similarly, a "State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the state." *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928).[9] When a statute discriminates against interstate commerce "*either* on its face or in practical effect," *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (emphasis added), this Court applies a rule of virtual *per se* invalidity.[10] *Philadelphia*, 437 U.S. at 624.[11] To prevail in these circumstances, the State must "demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1996). Conversely, if the statute does not discriminate against interstate commerce on its face or in its practical effect, then it must be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the

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[9] *See also H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 545 (1949) (invalidating attempt by New York State to inhibit exportation of milk).

[10] The issue of facial discrimination is an issue of law, but the issues of discrimination in their practical effect are issues of fact. *Waste Mgmt. Holdings v. Gilmore*, 252 F.3d 316, 334 (4th Cir. 2001).

[11] *See also Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 100 n.4 (1994).

putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

A. The Virginia Act Does Not Discriminate on its Face or in its Practical Effect.

The Virginia Act is facially neutral – it does not distinguish between viatical settlement providers located in Virginia and those located in other States. Indeed, the home of the viatical settlement provider is entirely irrelevant to the application of the Virginia Act. Thus, the Virginia law "visits its effects equally upon both interstate and local business." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987) (citation omitted).

Although a state law also will be found to be *per se* invalid "when its effect is to favor in-state economic interests over out-of-state interests," *Northwest Central Pipeline Corp v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 523 (1989), a requirement that companies conform their business conduct to different laws and regulations in different States is the consequence of our constitutional blueprint of dual sovereignty. That the States retain the power to legislate for the protection of their citizens may be the source of an energetic debate surrounding the issue of preemption, but it is not – by itself – a burden that violates the Dormant Commerce Clause. Put another way, that businesses must comply with multiple states' regulations does not impermissibly burden

interstate commerce.[12] In having to comply with regulatory regimes of many States, LPI is in the same position as countless other businesses.[13] Furthermore, the presence of in-state competitors is irrelevant to the Dormant Commerce Clause analysis. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978) (The fact that State had no in-state petroleum producers and refiners did not mean that state law discriminated against interstate commerce.).

B. The Virginia Act Survives *Pike* Balancing.

Because the Virginia Act is "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental," *Philadelphia*, 437 U.S. at 624, it will be "upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

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[12] *See Merrick v. N.W. Halsey & Co.*, 242 U.S. 569, 587 (1917); *Caldwell v. Sioux Falls Stock Yards*, 242 U.S. 559, 563 (1917); *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 557 (1917).

[13] Indeed, many other Virginia laws, as well as the laws of the forty-nine other States, have the same laudatory objectives (preventing fraud and unfair trade practices) as Virginia's Viatical Settlements Law. *See, e.g., Virginia Code* §§ 6.1-408 through 431 (Virginia Mortgage Lender and Broker Act); §§ 6.1-444 through 471 (Virginia Payday Loan Act), §§ 13.1-504 through 506 (Broker-Dealer registration requirements). Those laws provide for licensing, disclosures, proof of good character and financial soundness – the very concerns addressed by the Virginia laws in question here.

> A statute need not be perfectly tailored to survive *Pike* balancing, but it must be reasonably tailored: "the extent of the burden that will be tolerated . . . depends on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc., 401 F.3d 560, 569 (4th Cir.), *cert. denied sub nom., Smit v. Yamaha Motor Corp., U.S.A.*, 546 U.S. 936 (2005). The Virginia Act survives *Pike* balancing for two reasons.

First, *Pike* balancing is inappropriate for neutral consumer protection statutes like the Virginia Act. This Court rejects invitations to

> rigorously scrutinize economic legislation passed under the auspices of police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.

United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1798 (2007) (Roberts, C.J., joined by Souter, Ginsburg, & Breyer, JJ., announcing the judgment of the Court) (citation omitted). In other words, because the Virginia Act is an exercise of the police power and because it does not discriminate against interstate commerce on its face or in its practical effect, it should be exempt from

Pike balancing. *Id.* at 1799 (Scalia, J., concurring) (rejecting any form of *Pike* balancing).

Second, the benefits to the citizens of Virginia clearly outweigh any burden on interstate commerce. The Virginia Act serves an important sovereign interest – consumer protection concerns.[14] *See American Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 434 (2005). The purpose of the Virginia Act was to establish appropriate safeguards in order to protect Virginia residents, who were facing the last days of their life, from potential fraud and abuse should they wish to become involved in a viatical settlement. Accordingly, the Virginia laws provide for mandatory disclosures to viators, price floors, standards of conduct for providers, privacy protection, truth-in-advertising, and prohibition of unfair trade practices. *See Virginia Code* §§ 38.2-6000 through 6015. Licensing ensures that viatical providers are reputable, financially sound, and trustworthy. Mandatory disclosures and rescission rights require that viators have essential information before (and after) signing viatical settlement agreements. Anti-fraud provisions[15] are of obvious benefit to viators. These provisions easily survive rational-basis review. In addition, the fact that

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[14] While LPI would characterize viators as sellers in the marketplace, rather than consumers, they are nonetheless consumers when it comes to the services provided by LPI to facilitate, conclude, and implement the desired transactions.

[15] *Virginia Code* § 38.2-6011.

Congress permitted States to facilitate tax-free income to resident viators by establishing a licensing regime for providers underscores the importance of the local interest achieved by Virginia for its citizens in enacting such a regime. *See* 26 U.S.C. § 101(g)(2).

In sharp contrast, the burden of such regulation on LPI is minimal – the additional costs associated with compliance with the Virginia laws (*e.g.*, filing annual reports, paying the annual fee, and the like). Those costs are avoided easily by simply refusing to enter into transactions with Virginia residents. They have no influence whatsoever on LPI's business elsewhere. Moreover, they are hardly unreasonable when considered in light of the protections that they afford to the terminally ill and – as LPI expands its business – to the elderly. If such a minimal burden constitutes a violation of the Dormant Commerce Clause, then "all of the states" would be forced "to accept the lowest standard for conducting the business permitted by one of them or, perhaps, by foreign countries." *Robertson v. California*, 328 U.S. 440, 460 (1946). The Dormant Commerce Clause does not render a State "helpless to protect her people against the grossest forms of unregulated or loosely regulated foreign insurance" or to destroy "the system for control of purely local insurance business." *Id.*

The Dormant Commerce Clause does not bar reasonable consumer protection laws enacted pursuant to a State's sovereign police power. Thus, regardless of whether the McCarran-Ferguson Act applies, the judgment below is correct, albeit on

alternative grounds. This Petition presents neither an appropriate vehicle for elaboration on the scope of the McCarran-Ferguson Act nor an issue worthy of this Court's attention. Certiorari should be denied.

CONCLUSION

For reasons stated above and in the State Corporation Commission's Brief in Opposition, the Petition for a Writ of Certiorari should be **DENIED**.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LIFE PARTNERS, INC.

PETITIONER,

V.

THEODORE V. MORRISON, JR., IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE VIRGINIA STATE CORPORATION COMMISSION, ET AL.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF THEODORE V. MORRISON, JR., MARK C. CHRISTIE, AND JUDITH W. JAGDMANN, COMMISSIONERS OF THE VIRGINIA STATE CORPORATION COMMISSION, AND ALFRED W. GROSS, VIRGINIA COMMISSIONER OF INSURANCE

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QUESTIONS PRESENTED

Whether, aside from the effect of the McCarran-Ferguson Act, 26 U.S.C. § 101(g)(2) operates to insulate the Virginia Laws from challenge under the dormant Commerce Clause of the United States Constitution.

Whether the United States Court of Appeals for the Fourth Circuit erred in holding that the McCarran-Ferguson Act insulates the Virginia Viatical Settlements Act and accompanying regulations (the "Virginia Laws") from challenge under the dormant Commerce Clause of the United States Constitution.

Whether the Virginia Laws should be upheld against challenge under the dormant Commerce Clause of the United States Constitution because the Virginia Laws are not discriminatory, and their benefits clearly outweigh the incidental burdens of compliance, under the method of analysis set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) and as conducted by the District Court.

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STATUTES INVOLVED

The McCarran-Ferguson Act

15 U.S.C. §§ 1011 *et seq.*, and 26 U.S.C. § 101 are implicated in this appeal.

15 U.S.C. § 1011 (Section 1)

Declaration of policy

The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1012 (Section 2)

Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That . . . [the Sherman Act, Clayton Act, and Federal Trade Commission Act] shall be

applicable to the business of insurance to the extent that such business is not regulated by State law.

26 U.S.C. § 101

(g) Certain Death Benefits. (See Appendix for full citation)

INTRODUCTION

The Court should deny the petition for writ of certiorari because this case does not involve an unsettled issue of federal law, and the decision of the U. S. Court of Appeals for the Fourth Circuit neither conflicts with any decision of this Court nor with a decision by any other United States court of appeals. State laws regulating the resale of insurance policies on the lives of terminally ill people fall within the core protection conferred by the McCarran-Ferguson Act, and in fact are the product of federal legislation that encourages states to legislate in precisely the manner the Commonwealth of Virginia has legislated. The Fourth Circuit correctly affirmed dismissal of this lawsuit against the Commissioners of the Virginia State Corporation Commission and the Virginia Insurance Commissioner.

STATEMENT OF THE CASE

A viatical settlement is a transaction in which a terminally or chronically ill person (a "viator") sells a life insurance policy for an amount less than its face value. Texas-based Life Partners, Inc. ("LPI") is a viatical settlement provider. LPI works with brokers to identify viators and consummate transactions with residents of Virginia and other states. LPI is licensed in Texas by the Texas Insurance Department, but is not licensed in Virginia. Court of Appeals Joint Appendix ("C.A.J.A.") 16, 27. According to LPI's expert, viators with short life expectancies have impaired judgment, and suffer from "optimism bias." Hence, they tend to overestimate their life expectancy and are thus likely to "accept less than the actuarially fair value

on their policies." He added, "when people are making large economic decisions at a time when they're most vulnerable, they're prone to big mistakes." C.A.J.A. 127-131.

Model Act and Regulations

Because of the need to protect viators, as LPI's own expert tacitly recognized, and in order to create a fair viatical settlements market, the National Association of Insurance Commissioners ("NAIC") adopted a Model Viatical Settlements Act (the "Model Act") in 1993. The NAIC adopted Model Regulations in 1994. C.A.J.A. 99-100.

The Model Act provides for state licensing of viatical settlement providers and brokers. Applicants must disclose their owners, file a plan of operation, prove their good character and financial soundness, adopt an anti-fraud plan, appoint an agent for service of process, and file annual reports. The state insurance commissioner has authority to approve forms of contract. Providers must make detailed disclosures to viators. The viator has the right to rescind, and only providers licensed in the viator's state may monitor the viator's health. Abusive practices are barred. Providers must have a system of control over advertisements, which must conform to certain standards. Misleading advertisements are prohibited. Violations are an unfair trade practice. The Model Act authorizes the insurance commissioner to adopt regulations to ensure reasonable payments to viators. C.A.J.A. 48-85.

The Model Regulations implement the policies expressed in the Model Act. License requirements are rigorous. The Model Regulations set forth two pricing alternatives. One specifies percentage amounts of the face value, depending on the viator's life expectancy. For example, if a viator's life expectancy is less than 6 months, the minimum payment is 80% of the face value. For longer life expectancies, the minimum payment decreases to a smaller percentage of face value. For life expectancies above 25 months, the viator must receive the greater of cash surrender value or accelerated death benefit. The other alternative provides generally that the viator must receive a reasonable price, based on various criteria, such as the viator's age and life expectancy, face amount of policy, and other considerations. C.A.J.A. 86-95. Virginia adopted the first pricing alternative.

Virginia Viatical Settlements Act and Regulations

The Virginia Viatical Settlements Act was adopted in 1997 and revised in 2003. That statute granted enforcement responsibility and rule-making authority to the State Corporation Commission ("SCC").

The Virginia Laws largely track the Model Act and Regulations. The Virginia Laws: (i) require that providers be licensed and of good character, and that disclosures be made to viators before they are asked to sign any document (Va. Code § 38.2-6002 and 6007); (ii) establish general rules and regulations regarding advertising to viators (Va. Code § 38.2-6008 and 6010-11); (iii) impose requirements for fraud prevention (Va. Code § 38.2-6011); (iv) protect

viators' privacy (Va. Code § 38.2-6005); (v) require pre-clearance of forms of contract (Va. Code § 38.2-6003); and impose duties on insurers (Va. Code § 38.2-6008(A)(3). The SCC regulations were issued in 1997, revised in 2003, and: (i) limit contacts with viators to determine their health status (14 V.A.C. 5-71-90.D); (ii) establish minimum prices (14 V.A.C. 5-71-60); (iii) prohibit unfair and abusive practices by viatical providers and brokers; and (iv) prescribe duties and regulate practices of insurers with respect to policies that are viaticated (14 V.A.C. 5-71-93 – Insurance Company Practices).

The Virginia Laws define viatical brokers as fiduciaries for the provider, not for the insured, absent written agreement to the contrary (14 V.A.C. 5-71-50), because in viatical settlements, brokerage commissions are figured as a *percentage of face value* of the policy, not the sales price. C.A.J.A. 378-79, 843. In other words, viatical brokers make the same commission whether they obtain a high price–or a low price—for a viator.

The Jane Doe Transaction

Jane Doe, a terminally ill resident of Virginia, with a life expectancy of 6-18 months, owned a life insurance policy with a face value of $115,000. Using a New Jersey broker with whom she had a written agreement, Doe sold her policy in 2004 to a group of investors organized by LPI. LPI paid Jane Doe $29,900, 26% of the policy's face value. C.A.J.A. 16-18, 20, 125. This was much less than the 60% of face value minimum price (*i.e.*, $69,000) established by Virginia law for someone with an 18 month life expectancy. C.A.J.A. 18, 25. Jane Doe learned of the

Virginia Laws and demanded that LPI pay her the amount due by law. LPI refused. Doe filed a complaint with the Bureau of Insurance, a division of the SCC, which began enforcement proceedings against LPI. LPI then filed this 42 U.S.C. § 1983 action, alleging that the Virginia Laws violate the dormant Commerce Clause of the U. S. Constitution. The District Court held that the Virginia Laws did not impermissibly burden interstate commerce, and dismissed the case. *Life Partners, Inc. v. Miller,* 420 F. Supp. 2d 452 (E.D. Va. 2006). The Fourth Circuit affirmed, finding the Virginia Laws to be protected by the McCarran-Ferguson Act. *Life Partners, Inc. v. Morrison,* 484 F.3d 284 (4th Cir. 2007).

Jane Doe's viatical settlement had numerous Virginia contacts. From Virginia, Doe forwarded her application to the broker. The New Jersey broker called Doe in Virginia with LPI's offers. From Virginia, Doe told her broker that she accepted the offer from LPI. LPI sent transaction documents to Doe in Virginia. LPI called Doe in Virginia several times, and from Virginia Doe called LPI. Doe received the contract in Virginia, accepted it in Virginia, signed the contract forms in Virginia, and from Virginia, Doe returned the package to LPI. C.A.J.A. 17-19. LPI continues to monitor Virginia-resident Doe's medical condition. C.A.J.A. 123-24. Indeed, there is no evidence that Doe ever left Virginia during the entire viatical transaction.

LPI brings only an as-applied challenge to the Virginia Laws, not a facial challenge. C.A.J.A. 699.

REASONS FOR DENYING THE PETITION

Viatical Settlements Involve Insurance Companies

In its Question Presented, LPI states that "viatical settlements do not involve insurance companies." That statement is wrong, and reflects a fundamental misunderstanding of how viatical settlements operate.

When an insurer underwrites a policy (*e.g.*, it agrees to let the insured transfer the risk of untimely death from the insured to the insurer), the insurer makes assumptions about lapse and surrender rates. These assumptions directly affect the insurer's determination of how it will spread its risk, *i.e.*, whom it will choose to insure. An insurer's determination of how many policies will lapse or be surrendered is directly *and adversely* affected by viatical settlements. Because an investor-owned policy will neither lapse nor be surrendered (the investors will ensure that neither event occurs in order to protect their eventual profit), the insurer's actuarial risk is necessarily distorted. The more policies viaticated, the greater the distortion of risk. Hence, the calculations of the insurer as to (i) how many policies to issue, (ii) underwriting criteria, (iii) the estimated timing of payouts, and (iv) reinsurance analysis, all change when policies are viaticated, as the Fourth Circuit observed. *See Life Partners,* 484 F.3d at 293-95; C.A.J.A. 96-98. Thus, viatical settlement transactions have a critical impact on the risk-spreading profile of life insurance companies. C.A.J.A. 96-98.

In addition, the sale of a policy alters three key elements of the insurer-insured relationship: (i) a new entity has the right to designate and change beneficiaries; (ii) the recipient of life insurance proceeds has changed; and (iii) responsibility for the payment of premiums has changed. Also, prior to viatication, an insured may choose to live a life of unfettered privacy. Afterwards, the viator's place of residence and medical condition will be known to the provider, the broker, and to the investors. C.A.J.A. 849 (para. 3.3). The provider must also maintain active contact with the insured in order to keep advised of the insured's medical condition.

Moreover, the insurer must deal directly with a viatical provider (in addition to dealing with the insured) when documenting that the transfer is taking or has taken place, that all of the proper forms are completed, and that the sale of the policy actually occurs. Also, when a policy is viaticated, the insurer must follow procedures set forth in Va. Code § 38.2-6008(A)(4), including notifying the provider if it "intends to pursue an investigation regarding possible fraud or the validity of the insurance contract." The insurer must also respond to requests from viatical providers or brokers for verification of insurance coverage prior to a proposed viatical settlement. *See* 14 V.A.C. 5-71-93.

Viatical transactions also present potential complications affecting the insurer-insured relationship. Indeed, in the Jane Doe transaction at issue here, for nearly a year the insurer believed (mistakenly, as it turned out) that Jane Doe owned the policy – at a time that LPI claimed that it owned the policy. C.A.J.A. 104.

Viatical settlements thus not only involve insurance companies, they require active participation by insurance companies.

Internal Revenue Code

LPI mentions 26 U.S.C. § 101(g)(2) once, in a single sentence, as evincing the federal government's stimulation of the viatical settlement market by making proceeds of a viatical settlement tax-free. Petition, p. 6. It is understandable that LPI gave short shrift to this statute, because to have given it protracted shrift, as is due Congress's only statement on viatical settlements, would have undermined LPI's case to the point of collapse. In that statute Congress *authorized* the Virginia Laws now under attack by LPI, and *endorsed* minimum prices for viatical settlements about which LPI so strenuously complains. Accordingly, even before addressing the McCarran-Ferguson Act, the Virginia Laws will in any event survive challenge under the dormant Commerce Clause because Congress authorized viatical settlement regulation by the States, in the very form adopted by the Commonwealth of Virginia.

Where Congress has authorized States to regulate commerce in a specific way, such laws are immune from dormant Commerce Clause challenges, regardless of any impact the laws may have on interstate commerce. *See White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983); *see also Environmental Technology Council v. Sierra Club*, 98 F.3d 774, 782 (4th Cir. 1996), *cert. denied*, 535 U.S. 904 (2002). As this Court stated in *South-Central Timber Dev., Inc. v. Wunnicke*, 467

U.S. 82, 87-88 (1984), it is "clear that Congress may 'redefine the distribution of power over interstate commerce' by permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible." *Id.* (quoting *Southern Pacific Co. v. Arizona ex rel. Sullivan,* 325 U.S. 761, 769 (1945). In *Northeast Bancorp v. Board of Governors, FRS,* 472 U.S. 159, 174 (1985), the Court said, "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."

In order for a state law to be insulated from the dormant Commerce Clause, congressional intent to authorize the discriminating law must be either "unmistakably clear" or "expressly stated." *South-Central Timber,* 467 U.S. at 91-92. That does not mean that Congress must say that it intends to override the dormant Commerce Clause, but it does mean that Congress must have affirmatively contemplated the challenged state legislation. *Id.*

Fatal to LPI's dormant Commerce Clause challenge is the fact that Congress expressly authorized state regulation of viatical settlements. Congress did so emphatically: by providing that proceeds of viatical settlements would be exempt from federal income tax (i) when the provider is "licensed . . . in the State in which the insured resides," or (ii) if the provider is not licensed by the viator's state, when the viatical settlement provider meets both the requirements of sections 8 and 9 of the Model Act (concerning disclosures and post-sale contacts) as well as the *pricing* regulations prescribed in the Model Regulations. *See* 26 U.S.C. § 101(g)(2)(B)(ii)(I-II). Congress thus made it

"unmistakably clear" that it expected States to enact laws providing for the licensing of viatical providers and "plainly authorized" States to do so.

By conditioning tax-free proceeds on the provider being licensed in the viator's state of residence, Congress anticipated (indeed, encouraged) a multi-state licensing regime. Moreover, Congress itself adopted the Model Regulations' price floors in § 101(g)(2)(B)(ii)(II), and those mirror Virginia's percentage-of-face-value price floors in 14 V.A.C. 5-71-60. C.A.J.A. 91, 101. The federal price floors prove Congress (i) deemed price regulations for viatical settlements to be salutary, and (ii) must have expected some States (*e.g.*, Virginia) to adopt price floors paralleling those in the very Model Regulations to which Congress referred. LPI's lament about the market effects of Virginia's "onerous registration requirements" and "artificial price floors" (Petition, p. 8) is thus shown to be nothing more than a policy dispute with Congress.

It is significant that Congress referred to the NAIC Model Act and Regulations in § 101(g)(2)(B)(i) and (ii). Having enabled tax-free proceeds for viators if their home State licenses viatical providers, Congress thereby encouraged States to adopt licensing statutes patterned after the Model Act and Regulations. It hardly bears argument that by making certain income tax-free to residents if States legislate in a certain way, Congress "affirmatively contemplated" that States would legislate in precisely that way, as did Virginia. *See South-Central Timber*, 467 U.S. at 91-92.

The Fourth Circuit considered this Tax Code provision as buttressing its conclusion that the McCarran-Ferguson Act saves the Virginia Laws from challenge under the dormant Commerce Clause. *Life Partners,* 484 F.3d at 299. The Tax Code, however, provides even broader protection than the McCarran-Ferguson Act. Although the latter statute shields States from federal intrusion into matters of insurance in a general sense, and is thus a "hands-off" statute, the Tax Code provision intentionally *stimulated* State regulation of viatical settlements in order to confer substantial tax benefits on in-state viators.

Accordingly, even aside from the McCarran-Ferguson Act, Congress affirmatively contemplated State legislation in the form of the Virginia Laws, thereby insulating such legislation from challenge under the dormant Commerce Clause. As pointed out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), "this Court reviews judgments, not opinions . . . ." There is thus no reason to grant LPI's petition when the result of this appeal (upholding the Virginia Laws) would be the same—regardless of the Court's resolution of the McCarran-Ferguson Act questions.

McCarran-Ferguson Act

The McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (the "Act") restored States' traditional preeminence in the field of insurance. *See United States Dep't of the Treasury v. Fabe*, 508 U.S. 491, 507 (1993). In 15 U.S.C. § 1011, Congress declared that "the continued regulation and taxation by the several States of the business of insurance is in the

public interest, and . . . silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." Because the dormant Commerce Clause by definition bespeaks silence on Congress's part, § 1011 is an important Congressional policy statement limiting the potential impact of the dormant Commerce Clause on state laws regulating insurance.

The next section is § 1012, which provides:

> (a) State regulation
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State *for the purpose of regulating the business of insurance*, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided [that the Antitrust Laws] shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

Id. (emphasis supplied). Art. I, § 8, cl. 3 of the U. S. Constitution delegates to Congress authority over interstate commerce, and contains "a further, negative command, known as the dormant Commerce Clause," *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995), that "create[s] an area of trade free from interference by the States," *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (internal quotation marks omitted). The dormant Commerce Clause lies at the center of this case.

Although neither § 1011 nor § 1012 mentions the dormant Commerce Clause, this Court has held that the Act removed "obstructions that might be thought to flow from [Congress's] own power, *whether dormant or exercised.*" *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 430 (1946) (emphasis supplied). The Court repeated that message in *American Ins. Assn. v. Garamendi,* 539 U.S. 396, 428 (2003) ("the point of McCarran-Ferguson's legislative choice of leaving insurance regulation generally to the States was to limit congressional preemption under the commerce power, whether dormant or exercised."). There is no question that if the McCarran-Ferguson Act applies, it will insulate the Virginia Laws from LPI's dormant Commerce Clause challenge.

The Business of Insurance

The McCarran-Ferguson Act refers to "the business of insurance" five times: once each in Sections 1011 and 1012(a) and three times in Section 1012(b). In *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982), the Court directed lower courts

analyzing the meaning of the term "business of insurance" to consider "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." *Id.* This Court has held that none of the enumerated criteria was "necessarily determinative in itself," *see id.,* and, indeed, not all three factors need be satisfied in order for the Act to protect State laws. *See Rush Prudential HMO, Inc. v. Moran,* 536 U.S. 355, 373 (2002) (*Pireno* factors are "guideposts;" court may leave open the question whether a practice spreads policyholder risk where "second and third factors are clearly satisfied . . . .").

Section 1012(a)

At least two circuit courts of appeal conclude that 15 U.S.C. § 1012(a) (*i.e.*, § 2(a) of the Act) protects State regulation of insurance from the dormant Commerce Clause. *See Ruthardt v. United States,* 303 F.3d 375 (1st Cir. 2002*), cert. denied sub nom Ala. Ins. Guar. Ass'n. v. United States,* 538 U.S. 1031 (2003). The First Circuit noted that "Section 2(a) of the statute effectively safeguards state insurance regulation against preemption through the dormant Commerce Clause doctrine." *Ruthardt,* 303 F.3d at 380, n. 2 (*dicta*). The Third Circuit reached the same conclusion in a case that did not involve the dormant Commerce Clause, *Lac D'Amiante du Quebec, Ltee., v. American Home Assurance Company,* 864 F.2d 1033, 1038-39 (3rd Cir. 1988) ("15 U.S.C. § 1012(a) . . . frees state

insurance regulation from the negative force of the dormant commerce clause . . . .").

LPI states (Petition, p. 24, fn. 2): "[t]his Court has held that it is Section 2(a)—not Section 2(b) of the McCarran-Ferguson Act that 'operates to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack,'" citing *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 218, n. 18 (1979). The *Royal Drug* footnote, however, does not mention Section 2(a) or 2(b). Indeed, the text of the opinion states that § 2(a) is not involved in the case. The complete text of *Royal Drug* footnote 18 is "The McCarran-Ferguson Act operates to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack," without further focus on whether it is Section 2(a) or 2(b) that provides such protection.

Regardless of whether § 1012(a) or § 1012(b) applies, in the decision below (*Life Partners v. Morrison,* 484 F.3d 284 (4th Cir. 2007)), Judge Niemeyer analyzed the facts under every possible approach under the McCarran-Ferguson Act, beginning with the "relate to" language from § 2(a). The panel recognized that the words "relate to" merit an expansive interpretation, citing *N.Y. State Conf. v. Blue Cross & Blue Shield Plans v. Travelers,* 514 U.S. 645, 655 (1995), an ERISA case. *See Life Partners,* 484 F.3d at 296-97. LPI criticized this approach, arguing that this Court effected a "clean break" between the Act and ERISA (Petition, p. 24, citing *Kentucky Ass'n. of Health Plans, Inc. v. Miller,* 538 U.S. 329, 341 (2003)). The phrase "relate to", however, is entitled to an expansive

interpretation no matter what the context, ERISA or otherwise. *See, e.g., Barnett Bank of Marion Cty., N. A. v. Nelson,* 517 U.S. 25, 38 (1996), a McCarran-Ferguson case:

> The word "relates" is highly general, and this Court has interpreted it broadly in other pre-emption contexts. See, *e.g., Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 47 (1987) (words "relate to" have "broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan '. . . if it has a connection with or reference to such a plan'") (quoting *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 739 (1985), in turn quoting *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 97 (1983)); *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383-384 (1992) (interpreting similarly the words "relating to" in the Airline Deregulation Act of 1978).

Id. (internal punctuation edited). *Barnett* made the further common-sense observation that "a statute may specifically relate to more than one thing. Just as an ordinance forbidding dogs in city parks specifically relates to dogs and to parks, so a statute permitting banks to sell insurance can specifically relate to banks and to insurance." *Id.,* 517 U.S. at 41-42.

The Virginia Laws (i) provide consumer protection to viators who wish to sell their insurance policies; (ii) establish a licensing and regulatory

regime governing providers and brokers who facilitate the purchase of insurance policies from viators; and (iii) prescribe procedures designed to minimize fraud and deception in the sale of insurance policies. *Life Partners,* 484 F.3d at 296. The Virginia Laws also impose duties on insurers. *See* Va. Code § 38.2-6008.A.3 and A.4. The panel thus reasonably concluded that the Virginia Laws "relate to" the business of insurance because they address key aspects of insurance contracts, including "the marketing, sale, execution, performance, and administration of insurance contracts." *Life Partners,* 484 F.3d at 297. Accordingly, if § 1012(a) applies to this case, there was abundant record evidence proving that the Virginia Laws relate to the business of insurance.

Section 1012(b)

Having determined that the Virginia Laws survive scrutiny under § 1012(a), the Fourth Circuit next undertook to analyze the Virginia Laws from the perspective of § 1012(b), starting with the impact of *Fabe*, which explained the two clauses of § 1012(b):

> The language of § 2(b) is unambiguous: The first clause commits laws 'enacted . . . for the purpose of regulating the business of insurance' to the States, while the second clause exempts only 'the business of insurance' itself from the antitrust laws. To equate laws 'enacted . . . for the purpose of regulating the business of insurance' with the 'business of insurance' itself,

> as petitioners urge us to do, would be to read words out of the statute. This we refuse to do.

508 U.S. at 504. *Fabe* established the standard by which to interpret the phrase "enacted . . . for the purpose of regulating the business of insurance" in the first clause. The broad category of laws enacted "for the purpose of regulating the business of insurance" consists of laws that possess the "end, intention, or aim" of adjusting, managing, or controlling the business of insurance. This category necessarily encompasses more than just the "business of insurance." *Life Partners,* 484 F.3d at 298 (quoting *Fabe,* 508 U.S. at 505).

Adopting a similar rationale as it used with respect to the "relate to" language from § 1012(a), the panel looked to the effects of the Virginia Laws and held that they were enacted "for the purpose of regulating the business of insurance." The Fourth Circuit cited *Securities and Exch. Comm'n v. National Securities,* 393 U.S. 453 (1969) where this Court distinguished laws focused on protecting stockholders of an insurer (to which it held the McCarran-Ferguson Act inapplicable) from laws aimed at protecting those purchasing insurance policies (*i.e.*, insureds). *Id.* at 460, 462-63 (cited in *Life Partners*, 484 F.3d at 298). The Fourth Circuit also considered the numerous connections that the Virginia Laws have with insurers and insureds, including the requirement "that [viators] receive a fair price from licensed providers for the policies that become the subject of viatical settlements." *Life Partners,* 484 F.3d at 298. The panel looked to *Fabe*, where this Court held that a state law assigning

priority in an insurance company's bankruptcy proceeding was passed "for the purpose of regulating the business of insurance." *Fabe,* 508 U.S. at 504. If such a law met the "for the purpose" standard, "then surely a statute regulating the transferability of life insurance policies is also passed for the purpose of regulating the business of insurance." *Life Partners,* 484 F.3d at 298.

The panel's approach comports with the common-sense meaning of the words in the Act. If a State, for example, were to pass a law barring private resale of lottery tickets, no one would seriously question that the law was enacted "for the purpose of regulating" the business of conducting a lottery. Indeed, it should be *a priori* evident that a statutory scheme aimed at constraining the resale of insurance policies was enacted for the purpose of regulating the business of insurance. Thus, if the "for the purpose of regulating the business of insurance" language from § 1012(b) applies, the Fourth Circuit correctly held that the Act protects the Virginia Laws.

Virginia Laws Regulate the Business of Insurance

The Fourth Circuit next determined that the Virginia Laws so closely impact the insured-insurer relationship, and have such tangible effects on insureds and insurers, that they fall within "the McCarran-Ferguson Act's core protection of laws that actually regulate the "business of insurance." *Life Partners,* 484 F.3d at 298. The panel held that the Virginia Laws survive scrutiny in light of the three *Pireno* inquiries.

The first question is whether the law under review targets practices or provisions that "ha[ve] the effect of transferring or spreading a policyholder's risk." *Rush Prudential HMO,* 536 U.S. at 373 (citing *Pireno*, 458 U.S. at 129). Viatical settlements do result in the transfer of risk. As the Fourth Circuit observed, a viatical settlement "fractures the two-part insurance contract between the insurer and the insured and creates a new tripartite arrangement . . . among the insurer, the insured [and the provider]." *Life Partners,* 484 F.3d at 295. The insurer's risk is distorted because a viaticated policy will never lapse or be canceled: the more policies viaticated, the greater the distortion of the insurer's risk profile.

The effect on the policyholder's risk is even more dramatic. An insured buys a policy in order to hedge the economic risk of an early death, and agrees to make modest premium payments to assure a large payout upon the insured's early death. After a viatical settlement, however, the viator transfers his risk by changing the bet: the viator accepts an immediate payment of an amount less than the policy's face value in exchange for not having to pay premiums in the future (and also agrees to have outsiders monitor the viator's health and medical status until the viator's death). In addition, after a viatical settlement, the viatical investors run the risk of a long-lived viator, hoping (how else to put it?) for the viator's early death. That distinct risk – that the insured might live a long life – did not even exist prior to viatication, because when a policy is issued, both the insured and the insurer benefit (albeit in different ways) from the insured's long life. As can be seen from this analysis, the transfer of

risk among the various parties to viatical settlements is obvious and material.

Second, the viatical settlements are a "practice" that is integral to the policy relationship between the insurer and the insured. The insured-insurer relationship begins as bipartite, but after a viatical settlement, it is tripartite. The insurer has new obligations that did not exist prior to the viatical settlement: it must receive and respond to coverage inquiries, and disclose to the viatical provider whether it intends to pursue a fraud investigation. Va. Code § 38.2-6008(A)(3) and (4). Of course, the Virginia Laws are primarily focused on insureds, and provide consumer protections for terminally-ill persons considering whether to sell their insurance policies. Clearly, the right to own a life insurance policy, the right to receive the face amount upon the insured's death, and the right to change a beneficiary, are all integral to the policy relationship between insurer and insured. *See Life Partners,* 484 F.3d at 298, where the panel noted that after a viatical settlement, "the insured, whose life remains the insurable interest, is given new duties and has reduced rights under the policy." *See also Unum Life Ins. Co. of America v. Ward,* 526 U.S. 358, 374 (1999) (state law satisfied second *Pireno* factor because "California's rule changes the bargain between insurer and insured; it 'effectively creates a mandatory contract term' that requires the insurer to prove prejudice before enforcing a timeliness-of-claim provision."). In similar respect, but with even more consequence, the Virginia Laws create mandatory contract terms that (i) obligate the insurer to perform certain acts when a policy is viaticated; (ii) impose restrictions on insureds who

wish to sell their policies (*e.g.*, by requiring minimum prices); and (iii) create new entitlements to insureds who sell their policies (*e.g.*, affirmative disclosures, right of rescission). Also, the viatical settlement results in elimination of the viator's right to sell or cash-in the policy. Viatical settlements thus materially change policy obligations and are clearly integral to the insured-insurer relationship.

The third *Pireno* inquiry is whether the activity is limited to entities within the insurance industry. Of course, *Pireno* made clear that no single element is determinative, 458 U.S. at 129, and *Rush Prudential HMO* held that a factor may be disregarded if the other *Pireno* factors make clear that the state law is entitled to protection under the Act. *Id.*, 536 U.S. at 373. Indeed, *Pireno* held that there is not a *per se* rule that practices involving non-insurance-industry entities always fall outside of the "business of insurance." *Id.*, 458 U.S. at 133. With the first two factors here militating strongly in favor of applying the McCarran-Ferguson Act, the third factor might well be disregarded. The *Pireno* factors, however, are guideposts, *see Rush Prudential HMO*, 536 U.S. at 373, and in fact those guideposts properly navigated lead to the conclusion that the third *Pireno* factor is indeed satisfied.

In *Securities and Exch. Comm'n v. National Securities, Inc.*, 393 U.S. 453, 460 (1969), the Court held that "[s]tatutes aimed at protecting or regulating this [insured-insurer] relationship, *directly or indirectly*, are laws regulating the 'business of insurance.'" *Id.* (emphasis supplied). The Virginia Laws regulate the business of insurance both directly and indirectly, by protecting

insureds who wish to sell an insurance policy, and by protecting insurers (by, *e.g.*, providing for fraud investigations). To accomplish that protection, the laws regulate insurance-policy buyers and their agents (providers and brokers), policy sellers (insureds), and the party obligated by contract to perform the service required by the policy (insurers). In that context, the Virginia Laws are truly aimed at entities operating *within* the insurance industry. To put it another way, LPI may not be an "insurer," but its corporate mission is to purchase insurance policies from insureds. Surely, a common-sense understanding of viatical settlements, and using words in their plain meaning, leads to the conclusion that the Virginia Laws are aimed at entities operating "within" the insurance industry.

Accordingly, in its careful consideration of how viatical settlements work, and in its faithful application of the *Pireno* factors, the Fourth Circuit reasonably concluded that the Virginia Laws regulate the "business of insurance." *Life Partners*, 484 F.3d at 299.

Although LPI asserts that the Virginia Laws apply "to transactions that Virginia residents enter into both inside and outside the Commonwealth" (citing Va. Code § 38.2-6002), Petition, p. 28, the Bureau of Insurance has never enforced the Virginia Laws when the viatical settlement is entirely foreign, *i.e.*, a transaction that involved no activity in the Commonwealth of Virginia. C.A.J.A. 108. Moreover, because this case is an as-applied challenge, and because the Jane Doe transaction indisputably involved activities that occurred within the Commonwealth of Virginia, LPI's allegation of

extra-territorial application is irrelevant, moot, and wrong.

No Circuit Split

There is no split of authority among the circuit courts of appeal concerning the McCarran-Ferguson Act as would affect the resolution of this case. LPI cited cases from different circuits where the facts differ so fundamentally from those here that it is not surprising courts reached different conclusions as to whether the Act applied to the facts under review. Tellingly, none of those cases involved viatical settlements, which involve the sale of insurance policies.

LPI first cites *Genord v. Blue Cross & Blue Shield of Mich.*, 440 F.3d 802 (6th Cir. 2006). *Genord* involved a billing dispute between a group of doctors and an insurance company. The doctors claimed that Blue Cross & Blue Shield of Michigan ("BCBS") had violated civil RICO statutes by delaying or denying claims under health insurance policies. BCBS argued that RICO was reverse-preempted by § 1012(b) of the McCarran-Ferguson Act, because the Michigan Health Care Act governed their conduct, and that Act was enacted for the purpose of regulating the business of insurance. *Id.* at 806. The panel held that none of the three *Pireno* criteria were met: the billing practices under challenge did not spread policyholder risk; the parts of the Health Care Act at issue were not an integral part of the policy relationship because the policyholders are unconcerned with how doctors get paid; and doctors are not considered entities within the insurance industry. *Id.* at 807-809. This case is unlike *Genord*

because the Virginia Laws regulate the sale of insurance policies by insureds, not payments by insurers to third parties. *Genord* also sensibly analyzed *Fabe* and *Pireno* (and *Royal Drug*) as harmonious approaches to the McCarran-Ferguson Act, *see Genord,* 440 F.3d at 807-08, rebutting LPI's argument that *Fabe* somehow conflicts with those earlier McCarran-Ferguson cases. Petition, p. 25.

Next, LPI cites *Prudential Insurance Co. of America, et. al. v. National Park Medical Center Inc.*, 154 F.3d 812 (8th Cir. 1998), where under challenge was an Arkansas law that required health insurers to include in their plans any health-care providers willing to accept the insurer's requirements. The insurer wished to choose its own providers, and argued that the law was barred by ERISA. The Eighth Circuit applied § 1012(b) analysis and rejected that argument, because the Arkansas law had at most an attenuated connection to the insured-insurer relationship. 154 F.3d at 830. Here, in contrast, the Virginia Laws directly regulate the insured-insurer relationship, and focus on the sale of the ownership rights to the policy itself. In fact, the McCarran-Ferguson Act was a sidelight in *Prudential*, because the panel's main focus was on ERISA preemption, making it inapt for purposes of comparison to this case.

LPI also cites *Davis v. Centennial Life Ins. Co.*, 128 F.3d 934, 942 (6th *Cir.* 1997), which involved a state law that did not affect the terms of the underlying insurance contract, so the *Pireno* factors were found not satisfied. Here, in contrast, Jane Doe's contract (*i.e.*, for her beneficiary to receive a $115,000 death benefit) was changed materially by

her viatical settlement, as were her duties and the insurer's duties under the contract of insurance, as discussed in detail above.

Finally, LPI cites *Liberty Glass Co., Inc. v. Allstate Insurance Co., et al.*, 607 F.2d 135 (5th Cir. 1979) for the proposition that "the business of insurance does not encompass agreements between insurers and third party providers of goods and services." Pet. for Writ of Cert. 16. *Liberty Glass* involved a lawsuit by firms selling and installing automobile glass against a glass manufacturer and auto insurance companies, alleging collusion and antitrust violations. The Fifth Circuit analyzed the case under § 1012(b), and held that the defendants' collusive agreement involved neither risk-spreading nor the insured-insurer relationship. The collusive agreements were held to potentially aid policyholders (by reducing repair costs), but were found not to be the "business of insurance." *Id.* at 137. The differences between *Liberty Glass* (a pre-*Fabe* opinion) and the case at bar are obvious: that case dealt with replacing windshields; this case involves the protection of insureds who sell their insurance policies.

These cases do not reveal a circuit split. In fact, if this Court finds that § 1012(a) applies, the foregoing cases are inapposite because all were decided pursuant to § 1012(b), and none involved the dormant Commerce Clause. Even if § 1012(b) governs this case, the facts in those four cases are removed from the actual business of insurance. In none of them were the rights of policyholders *in the insurance policy* affected or altered. Each turned on the relationship between the insurer and a third

party, and in each the substantive rights of the policyholders, and the rights of the insurer vis-à-vis the policy itself remained unaltered. The case at bar, in contrast, deals with the resale of insurance policies, with effects on the insured and insurer, thus falling within the heartland of State statutes which the McCarran-Ferguson Act was designed to protect. Not only is there no circuit split on this issue, the only other viatical settlements case to have reached a circuit court of appeals resulted in affirmance of a district court's judgment that the Georgia Life Settlements Act was protected by the McCarran-Ferguson Act because it "regulates . . . core aspects of the business of insurance." *Nat'l. Viatical, Inc. v. Oxendine,* 2006 U.S. Dist. LEXIS 25851, at *6 (N.D. Ga. 2006) (*aff'd without opinion*, 221 F. App'x. 899 (11th Cir. 2007)).

Securities-Side Cases Are Irrelevant

LPI argues that the Fourth Circuit ruling conflicts with cases holding that viatical settlements are not the business of insurance. Petition, p. 18. LPI glosses over the fact that those cases involved the *securities side* of a viatical transaction, where the provider syndicates the ownership interest in the policy to investors. *See, e.g., Securities and Exch. Comm'n v. Life Partners, Inc.*, 87 F.3d 536, 542 (D.C. Cir. 1996) ("LPI I"). The securities side of a viatical settlement is manifestly different from the insurance side, and involves entirely separate concerns. Only the insurance side of a viatical settlement merits analysis under the McCarran-Ferguson Act, which is, after all, an insurance-focused statute, not a securities-focused statute. *See National Securities,* 393 U.S. at 460 ("This [a state law governing

insurance company mergers] is not insurance regulation, it is securities regulation."). The Fourth Circuit repeatedly emphasized this distinction. *Life Partners,* 484 F.3d at 289-90, 298, 300. LPI also cited *Life Partners, Inc. v. Life. Ins. Co. of N. Am.,* 1998 U.S. Dist. LEXIS 23544, at *8 (W.D. Tex. 1998), *aff'd on other grounds*, 203 F.3d 324 (5th Cir. 1999), but that case engaged in no principled analysis, applied anti-trust analysis to a non-antitrust case, and relied by rote on LPI I, which was a securities-side decision.

No Reason to Revisit or Overrule *Fabe*

There is no reason to re-examine or overrule *Fabe*. *Fabe* deals with the first clause of § 1012(b), and is not even implicated if § 1012(a) applies. In any event, the Fourth Circuit reasonably integrated *Fabe* and *Pireno*. The panel held that in order to determine the meaning of "for the purpose of regulating the business of insurance" in § 1012(b), it is necessary to examine the *Pireno* factors as guideposts to the words "business of insurance." *See Life Partners,* 484 F.3d at 299. *Fabe's* focus on the words "for the purpose of regulating," moreover, is an unexceptional exercise of the established principle that courts should "give effect, if possible, to every clause and word of a statute." *Moskal v. United States,* 498 U.S. 103, 109-110 (1990) (citing *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)).

Justice Kennedy's dissent in *Fabe* recognized the validity of this approach, observing that the words "for the purpose of regulating" mean something significant: "It is true that laws enacted

for the purpose of regulating the business of insurance are something different from activities of insurers constituting the business of insurance, but in my mind this distinction does not compel a conclusion that cases such as *Royal Drug* and *Pireno* have no application here." 508 U.S. at 515 (Kennedy, J., dissenting) (internal citation omitted). His concern was that the Court not jettison *Pireno* from the examination of the "business of insurance." *Id.* *Life Partners* satisfied the dissent's concerns, because the panel did apply the *Pireno* factors in determining that the Virginia Laws were enacted "for the purpose of regulating the business of insurance." *Life Partners,* 484 F.3d at 298-99.

Finally, the dissent said that "the most serious flaw of [*Fabe*'s] analytic approach" was the Court's holding that the insolvency statute at issue was only partly a regulation of the business of insurance. Justice Kennedy believed "that a law enacted to determine the priority of creditor claims in proceedings to liquidate an insolvent insurance company either is the regulation of the business of insurance or is not." *Id.,* 508 U.S. at 517-518 (Kennedy, J., dissenting). The case at bar, in contrast, is not a state insolvency statute, does not involve consideration whether only parts of the Virginia Laws are protected by the Act, and is therefore an inapt vehicle through which to address the *Fabe* dissent's principal concern.

Pike Balancing Issues

LPI concludes by arguing that the benefits of the Virginia Laws are outweighed by the costs of complying with them, that the Virginia Laws pose

conflicts with Texas laws, and that the Fourth Circuit's opinion will have "potentially devastating" consequences for business sectors outside the insurance industry. These concerns are unjustified.

Pike v. Bruce Church, Inc.

In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the Court held that a non-discriminatory state law with only incidental effects on commerce will survive challenge under the dormant Commerce Clause unless the burden on commerce is "clearly excessive" compared with the putative benefits of the statute. *Id.* In the case at bar, the District Court conducted a comprehensive analysis of the benefits and burdens of the Virginia Laws, and found that the benefits clearly outweighed the burdens. *See Life Partners, Inc. v. Miller,* 420 F. Supp. 2d 452, 467 (E.D. Va. 2006). In particular, the court held that the burdens of complying with the Virginia Laws are "similar to those governing such other industries as banking, insurance and security dealers." The benefits of the Virginia Laws are obvious: consumer protection for terminally-ill viators. In addition, the Virginia Laws establish a licensing regime such that in-state viators would receive tax-free proceeds as envisioned by Congress in 26 U.S.C. § 101(g)(2), clearly a significant benefit.

That businesses must comply with *multiple* states' regulations does not impermissibly burden interstate commerce. *See Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917), *Caldwell v. Sioux Falls Stock Yards*, 242 U.S. 559 (1917) and *Merrick v. N.W. Halsey & Co.*, 242 U.S. 569 (1917)(the "Blue Sky" cases). The Blue Sky cases all involved Commerce

Clause challenges, and in each the Court upheld State securities laws, because the laws applied only to in-State activities. The same rationale applies here, except with more force, because Congress provided an express incentive for States to license viatical providers, *see* 26 U.S.C. § 101(g)(2)(B), and it was inevitable that dozens of States would do so, in order to achieve tax-free income for their citizens. Hence, because Congress spurred enactment of licensing laws, LPI cannot complain that complying with them impermissibly burdens interstate commerce. In having to comply with regulatory regimes of many States, LPI is in the same position as countless other businesses in the financial services industry, including interstate banks, securities sellers and brokers, and marketers of other consumer-related financial services, as the District Court recognized.

Virginia Laws Do Not Conflict With Other States' Laws

This is an as-applied challenge. C.A.J.A. 699. Although LPI alleges that the Virginia Laws conflict with the Texas licensing statutes, Petition, p. 28, there was no such conflict in the case at bar. Indeed, the District Court ruled that two conflicts alleged by LPI were in fact illusory, and refused to undertake a line-by-line analysis of a cryptic exhibit (C.A.J.A. 260-65) tendered by LPI that purported to illustrate other conflicts. *See Life Partners, Inc. v. Miller,* 420 F. Supp. 2d at 466, n. 2 (LPI is attempting "to create a conflict where one does not exist."). LPI's statement (Petition, p. 28), that Virginia and Texas law conflict with regard to fiduciary duty owed by a broker is purely hypothetical, because Jane Doe *did*

have a written agreement with her broker, making the broker Doe's fiduciary—the same as he would have been in Texas.

Unwarranted Fears

No LPI brief is complete without a parade of horribles. LPI here strikes the tocsin to warn that the Fourth Circuit's ruling portends "potentially devastating" consequences for pharmacies and nursing homes, as well as for the manufacturers of fuel injectors, axles, and bumpers, all evidently facing ruin because the Virginia Laws regulate viatical settlements. Petition, p. 26. The record of this case, however, contains no evidence that State laws patterned after the Model Act have had or will have any impact whatsoever outside the area of viatical settlements. Moreover, Congress enacted 26 U.S.C. § 101(g)(2) to spur viatical settlement regulation by the States; Congress must be presumed to be aware of the consequences of its legislation. *See NASA v. FLRA*, 527 U.S. 229, 245 (1999) (when enacting a statute, "[w]e must presume . . . that Congress took account of the policy concerns on both sides of the balance . . . ."). In any event, the industries about which LPI frets lie outside the business of insurance, and have nothing to fear from a principled application of the McCarran-Ferguson Act to the sale of insurance policies.

LPI also fancifully speculates that the Fourth Circuit's ruling might result in a host of blatantly discriminatory and unconstitutional enactments by the Virginia General Assembly. Petition, p. 27. LPI's musings should be ignored. No such

legislation exists, and in an as-applied challenge, LPI's alarums are irrelevant.

CONCLUSION

For the foregoing reasons, the Court should deny LPI's petition for writ of certiorari.

Respectfully submitted,

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No. 07-261

IN THE

Supreme Court of the United States

LIFE PARTNERS, INC.

PETITIONER,

V.

THEODORE V. MORRISON, JR., IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE VIRGINIA STATE CORPORATION COMMISSION, ET AL.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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APPENDIX A

26 USCS § 101

§ 101. Certain death benefits.

(a) Proceeds of life insurance contracts payable by reason of death.

(1) General rule. Except as otherwise provided in paragraph (2), subsection (d), subsection (f), and subsection (j), gross income does not include amounts received (whether in a single sum or otherwise) under a life insurance contract, if such amounts are paid by reason of the death of the insured.

(2) Transfer for valuable consideration. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance contract or any interest therein, the amount excluded from gross income by paragraph (1) shall not exceed an amount equal to the sum of the actual value of such consideration and the premiums and other amounts subsequently paid by the transferee. The preceding sentence shall not apply in the case of such a transfer

(A) if such contract or interest therein has a basis for determining gain or loss in the hands of a transferee determined in whole or in part by reference to such basis of such contract or interest therein in the hands of the transferor, or

(B) if such transfer is to the insured, to a partner of the insured, to a partnership in which the insured is a partner, or to a corporation in which the insured is a shareholder or officer.

The term "other amounts" in the first sentence of this paragraph includes interest paid or accrued by the transferee on indebtedness with respect to such contract or any interest therein if such interest paid or accrued is not allowable as a deduction by reason of section 264(a)(4) [26 USCS § 264(a)(4)].

(b) Repealed.

(c) Interest. If any amount excluded from gross income by subsection (a) is held under an agreement to pay interest thereon, the interest payments shall be included in gross income.

(d) Payment of life insurance proceeds at a date later than death.

(1) General rule. The amounts held by an insurer with respect to any beneficiary shall be prorated (in accordance with such regulations as may be prescribed by the Secretary) over the period or periods with respect to which such payments are to be made. There shall be excluded from the gross income of such beneficiary in the taxable year received any amount determined by such proration. Gross income includes, to the extent not excluded by the preceding sentence, amounts received under agreements to which this subsection applies.

(2) Amount held by an insurer. An amount held by an insurer with respect to any beneficiary shall mean an amount to which subsection (a) applies which is—

(A) held by any insurer under an agreement provided for in the life insurance contract, whether as an option or otherwise, to pay such amount on a date or dates later than the death of the insured, and

(B) equal to the value of such agreement to such beneficiary

(i) as of the date of death of the insured (as if any option exercised under the life insurance contract were exercised at such time), and

(ii) as discounted on the basis of the interest rate used by the insurer in calculating payments under the agreement and mortality tables prescribed by the Secretary.

(3) Application of subsection. This subsection shall not apply to any amount to which subsection (c) is applicable.

(e) Repealed.

(f) Proceeds of flexible premium contracts issued before January 1, 1985 payable by reason of death.

(1) In general. Any amount paid by reason of the death of the insured under a flexible premium life insurance contract issued before January 1, 1985 shall be excluded from gross income only if—

(A) under such contract—

(i) the sum of the premiums paid under such contract does not at any time exceed the guideline premium limitation as of such time, and

(ii) any amount payable by reason of the death of the insured (determined without regard to any qualified additional benefit) is not at any time less than the applicable percentage of the cash value of such contract at such time, or

(B) by the terms of such contract, the cash value of such contract may not at any time exceed the net single premium with respect to the amount payable by reason of the death of the insured (determined without regard to any qualified additional benefit) at such time.

(2) Guideline premium limitation. For purposes of this subsection—

(A) Guideline premium limitation. The term "guideline premium limitation" means, as of any date, the greater of—

(i) the guideline single premium, or

(ii) the sum of the guideline level premiums to such date.

(B) Guideline single premium. The term "guideline single premium" means the premium at issue with respect to future benefits under the contract (without regard to any qualified additional benefit), and with respect to any charges for

qualified additional benefits, at the time of a determination under subparagraph (A) or (E) and which is based on—

(i) the mortality and other charges guaranteed under the contract, and

(ii) interest at the greater of an annual effective rate of 6 percent or the minimum rate or rates guaranteed upon issue of the contract.

(C) Guideline level premium. The term "guideline level premium" means the level annual amount, payable over the longest period permitted under the contract (but ending not less than 20 years from date of issue or not later than age 95, if earlier), computed on the same basis as the guideline single premium, except that subparagraph (B)(ii) shall be applied by substituting "4 percent" for "6 percent".

(D) Computational rules. In computing the guideline single premium or guideline level premium under subparagraph (B) or (C)—

(i) the excess of the amount payable by reason of the death of the insured (determined without regard to any qualified additional benefit) over the cash value of the contract shall be deemed to be not greater than such excess at the time the contract was issued,

(ii) the maturity date shall be the latest maturity date permitted under the contract, but not less than 20 years after the date of issue or (if earlier) age 95, and

(iii) the amount of any endowment benefit (or sum of endowment benefits) shall be deemed not to exceed the least amount payable by reason of the death of the insured (determined without regard to any qualified additional benefit) at any time under the contract.

(E) Adjustments. The guideline single premium and guideline level premium shall be adjusted in the event of a change in the future benefits or any qualified additional benefit under the contract which was not reflected in any guideline single premiums or guideline level premium previously determined.

(3) Other definitions and special rules. For purposes of this subsection—

(A) Flexible premium life insurance contract. The terms "flexible premium life insurance contract" and "contract" mean a life insurance contract (including any qualified additional benefits) which provides for the payment of one or more premiums which are not fixed by the insurer as to both timing and amount. Such terms do not include that portion of any contract which is treated under State law as providing any annuity benefits other than as a settlement option.

(B) Premiums paid. The term "premiums paid" means the premiums paid under the contract less any amounts (other than amounts includible in gross income) to which section 72(e) [26 USCS § 72(e)] applies. If, in order to comply with the requirements of paragraph (1)(A), any portion of any premium paid during any contract year is returned

by the insurance company (with interest) within 60 days after the end of a contract year—

(i) the amount so returned (excluding interest) shall be deemed to reduce the sum of the premiums paid under the contract during such year, and

(ii) notwithstanding the provisions of section 72(e) [26 USCS § 72(e)], the amount of any interest so returned shall be includible in the gross income of the recipient.

(C) Applicable percentage. The term "applicable percentage" means—

(i) 140 percent in the case of an insured with an attained age at the beginning of the contract year of 40 or less, and

(ii) in the case of an insured with an attained age of more than 40 as of the beginning of the contract year, 140 percent reduced (but not below 105 percent) by one percent for each year in excess of 40.

(D) Cash value. The cash value of any contract shall be determined without regard to any deduction for any surrender charge or policy loan.

(E) Qualified additional benefits. The term "qualified additional benefits" means any—

(i) guaranteed insurability,

(ii) accidental death benefit,

(iii) family term coverage, or

(iv) waiver of premium.

(F) Premium payments not disqualifying contract. The payment of a premium which would result in the sum of the premiums paid exceeding the guideline premium limitation shall be disregarded for purposes of paragraph (1)(A)(i) if the amount of such premium does not exceed the amount necessary to prevent the termination of the contract without cash value or on before the end of the contract year.

(G) Net single premium. In computing the net single premium under paragraph (1)(B)—

(i) the mortality basis shall be that guaranteed under the contract (determined by reference to the most recent mortality table allowed under all State laws on the date of issuance),

(ii) interest shall be based on the greater of—

(I) an annual effective rate of 4 percent (3 percent for contracts issued before July 1, 1983), or

(II) the minimum rate or rates guaranteed upon issue of the contract, and

(iii) the computational rules of paragraph (2)(D) shall apply, except that the maturity date referred to in clause (ii) thereof shall not be earlier than age 95.

(H) Correction of errors. If the taxpayer establishes to the satisfaction of the Secretary that—

(i) the requirements described in paragraph (1) for any contract year was not satisfied due to reasonable error, and

(ii) reasonable steps are being taken to remedy the error,

the Secretary may waive the failure to satisfy such requirements.

(I) Regulations. The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection.

(g) Treatment of certain accelerated death benefits.

(1) In general. For purposes of this section, the following amounts shall be treated as an amount paid by reason of the death of an insured:

(A) Any amount received under a life insurance contract on the life of an insured who is a terminally ill individual.

(B) Any amount received under a life insurance contract on the life of an insured who is a chronically ill individual.

(2) Treatment of viatical settlements.

(A) In general. If any portion of the death benefit under a life insurance contract on the life of an insured described in paragraph (1) is sold

or assigned to a viatical settlement provider, the amount paid for the sale or assignment of such portion shall be treated as an amount paid under the life insurance contract by reason of the death of such insured.

(B) Viatical settlement provider.

(i) In general. The term "viatical settlement provider" means any person regularly engaged in the trade or business of purchasing, or taking assignments of, life insurance contracts on the lives of insureds described in paragraph (1) if—

(I) such person is licensed for such purposes (with respect to insureds described in the same subparagraph of paragraph (1) as the insured) in the State in which the insured resides, or

(II) in the case of an insured who resides in a State not requiring the licensing of such persons for such purposes with respect to such insured, such person meets the requirements of clause (ii) or (iii), whichever applies to such insured.

(ii) Terminally ill insureds. A person meets the requirements of this clause with respect to an insured who is a terminally ill individual if such person—

(I) meets the requirements of sections 8 and 9 of the Viatical Settlements Model Act of the National Association of Insurance Commissioners, and

(II) meets the requirements of the Model Regulations of the National Association of

Insurance Commissioners (relating to standards for evaluation of reasonable payments) in determining amounts paid by such person in connection with such purchases or assignments.

(iii) Chronically ill insureds. A person meets the requirements of this clause with respect to an insured who is a chronically ill individual if such person—

(I) meets requirements similar to the requirements referred to in clause (ii)(I), and

(II) meets the standards (if any) of the National Association of Insurance Commissioners for evaluating the reasonableness of amounts paid by such person in connection with such purchases or assignments with respect to chronically ill individuals.

(3) Special rules for chronically ill insureds. In the case of an insured who is a chronically ill individual—

(A) In general. Paragraphs (1) and (2) shall not apply to any payment received for any period unless—

(i) such payment is for costs incurred by the payee (not compensated for by insurance or otherwise) for qualified long-term care services provided for the insured for such period, and

(ii) the terms of the contract giving rise to such payment satisfy—

(I) the requirements of section 7702B(b)(1)(B) [26 USCS § 7702B(b)(1)(B)], and

(II) the requirements (if any) applicable under subparagraph (B).

For purposes of the preceding sentence, the rule of section 7702B(b)(2)(B) [26 USCS § 7702B(b)(2)(B)] shall apply.

(B) Other requirements. The requirements applicable under this subparagraph are—

(i) those requirements of section 7702B(g) [26 USCS § 7702B(g)] and section 4980C [26 USCS § 4980C] which the Secretary specifies as applying to such a purchase, assignment, or other arrangement,

(ii) standards adopted by the National Association of Insurance Commissioners which specifically apply to chronically ill individuals (and, if such standards are adopted, the analogous requirements specified under clause (i) shall cease to apply), and

(iii) standards adopted by the State in which the policyholder resides (and if such standards are adopted, the analogous requirements specified under clause (i) and (subject to section 4980C(f) [26 USCS § 4980C(f)]) standards under clause (ii), shall cease to apply).

(C) Per diem payments. A payment shall not fail to be described in subparagraph (A) by reason of being made on a per diem or other periodic

basis without regard to the expenses incurred during the period to which the payment relates.

(D) Limitation on exclusion for periodic payments. For limitation on amount of periodic payments which are treated as described in paragraph (1), see section 7702B(d) [26 USCS § 7702B(d)].

(4) Definitions. For purposes of this subsection—

(A) Terminally ill individual. The term "terminally ill individual" means an individual who has been certified by a physician as having an illness or physical condition which can reasonably be expected to result in death in 24 months or less after the date of the certification.

(B) Chronically ill individual. The term "chronically ill individual" has the meaning given such term by section 7702B(c)(2) [26 USCS § 7702B(c)(2)]; except that such term shall not include a terminally ill individual.

(C) Qualified long-term care services. The term "qualified long-term care services" has the meaning given such term by section 7702B(c) [26 USCS § 7702B(c)].

(D) Physician. The term "physician" has the meaning given to such term by section 1861(r)(1) of the Social Security Act (42 U.S.C. 1395x(r)(1)).

(5) Exception for business-related policies. This subsection shall not apply in the case of any amount paid to any taxpayer other than the insured

if such taxpayer has an insurable interest with respect to the life of the insured by reason of the insured being a director, officer, or employee of the taxpayer or by reason of the insured being financially interested in any trade or business carried on by the taxpayer.

(h) Survivor benefits attributable to service by a public safety officer who is killed in the line of duty.

(1) In general. Gross income shall not include any amount paid as a survivor annuity on account of the death of a public safety officer (as such term is defined in section 1204 of the Omnibus Crime Control and Safe Streets Act of 1968 [42 USCS § 3796b]) killed in the line of duty—

(A) if such annuity is provided, under a governmental plan which meets the requirements of section 401(a) [26 USCS § 401(a)], to the spouse (or a former spouse) of the public safety officer or to a child of such officer; and

(B) to the extent such annuity is attributable to such officer's service as a public safety officer.

(2) Exceptions. Paragraph (1) shall not apply with respect to the death of any public safety officer if, as determined in accordance with the provisions of the Omnibus Crime Control and Safe Streets Act of 1968—

(A) the death was caused by the intentional misconduct of the officer or by such officer's intention to bring about such officer's death;

(B) the officer was voluntarily intoxicated (as defined in section 1204 of such Act [42 USCS § 3796b]) at the time of death;

(C) the officer was performing such officer's duties in a grossly negligent manner at the time of death; or

(D) the payment is to an individual whose actions were a substantial contributing factor to the death of the officer.

(i) Certain employee death benefits payable by reason of death of certain terrorist victims or astronauts.

(1) In general. Gross income does not include amounts (whether in a single sum or otherwise) paid by an employer by reason of the death of an employee who is a specified terrorist victim (as defined in section 692(d)(4) [26 USCS § 692(d)(4)]).

(2) Limitation.

(A) In general. Subject to such rules as the Secretary may prescribe, paragraph (1) shall not apply to amounts which would have been payable after death if the individual had died other than as a specified terrorist victim (as so defined).

(B) Exception. Subparagraph (A) shall not apply to incidental death benefits paid from a plan described in section 401(a) [26 USCS § 401(a)] and exempt from tax under section 501(a) [26 USCS § 501(a)].

(3) Treatment of self-employed individuals. For purposes of paragraph (1), the term "employee" includes a self-employed individual (as defined in section 401(c)(1) [26 USCS § 401(c)(1)]).

(4) Relief with respect to astronauts. The provisions of this subsection shall apply to any astronaut whose death occurs in the line of duty.

(j) Treatment of certain employer-owned life insurance contracts.

(1) General rule. In the case of an employer-owned life insurance contract, the amount excluded from gross income of an applicable policyholder by reason of paragraph (1) of subsection (a) shall not exceed an amount equal to the sum of the premiums and other amounts paid by the policyholder for the contract.

(2) Exceptions. In the case of an employer-owned life insurance contract with respect to which the notice and consent requirements of paragraph (4) are met, paragraph (1) shall not apply to any of the following:

(A) Exceptions based on insured's status. Any amount received by reason of the death of an insured who, with respect to an applicable policyholder—

(i) was an employee at any time during the 12-month period before the insured's death, or

(ii) is, at the time the contract is issued—

(I) a director,

(II) a highly compensated employee within the meaning of section 414(q) [26 USCS § 414(q)] (without regard to paragraph (1)(B)(ii) thereof), or

(III) a highly compensated individual within the meaning of section 105(h)(5) [26 USCS § 105(h)(5)], except that "35 percent" shall be substituted for "25 percent" in subparagraph (C) thereof.

(B) Exception for amounts paid to insured's heirs. Any amount received by reason of the death of an insured to the extent—

(i) the amount is paid to a member of the family (within the meaning of section 267(c)(4) [26 USCS § 267(c)(4)]) of the insured, any individual who is the designated beneficiary of the insured under the contract (other than the applicable policyholder), a trust established for the benefit of any such member of the family or designated beneficiary, or the estate of the insured, or

(ii) the amount is used to purchase an equity (or capital or profits) interest in the applicable policyholder from any person described in clause (i).

(3) Employer-owned life insurance contract.

(A) In general. For purposes of this subsection, the term "employer-owned life insurance contract" means a life insurance contract which—

(i) is owned by a person engaged in a trade or business and under which such person (or a related person described in subparagraph (B)(ii)) is directly or indirectly a beneficiary under the contract, and

(ii) covers the life of an insured who is an employee with respect to the trade or business of the applicable policyholder on the date the contract is issued.

For purposes of the preceding sentence, if coverage for each insured under a master contract is treated as a separate contract for purposes of sections 817(h), 7702, and 7702A [26 USCS §§ 817(h), 7702, and 7702A], coverage for each such insured shall be treated as a separate contract.

(B) Applicable policyholder. For purposes of this subsection—

(i) In general. The term "applicable policyholder" means, with respect to any employer-owned life insurance contract, the person described in subparagraph (A)(i) which owns the contract.

(ii) Related persons. The term "applicable policyholder" includes any person which—

(I) bears a relationship to the person described in clause (i) which is specified in section 267(b) or 707(b)(1) [26 USCS § 267(b) or 707(b)(1)], or

(II) is engaged in trades or businesses with such person which are under common control (within the meaning of subsection (a) or (b) of section 52 [26 USCS § 52]).

(4) Notice and consent requirements. The notice and consent requirements of this paragraph are met if, before the issuance of the contract, the employee—

(A) is notified in writing that the applicable policyholder intends to insure the employee's life and the maximum face amount for which the employee could be insured at the time the contract was issued,

(B) provides written consent to being insured under the contract and that such coverage may continue after the insured terminates employment, and

(C) is informed in writing that an applicable policyholder will be a beneficiary of any proceeds payable upon the death of the employee.

(5) Definitions. For purposes of this subsection—

(A) Employee. The term "employee" includes an officer, director, and highly compensated employee (within the meaning of section 414(q) [26 USCS § 414(q)]).

(B) Insured. The term "insured" means, with respect to an employer-owned life insurance contract, an individual covered by the contract who is a United States citizen or resident. In the case of a

contract covering the joint lives of 2 individuals, references to an insured include both of the individuals.

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No. 07-261

IN THE

Supreme Court of the United States

LIFE PARTNERS, INC.,

Petitioner,

v.

THEODORE V. MORRISON, JR., in his official capacity as Commissioner of the Virginia State Corporation Commission, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

The opposition briefs filed by the State Corporation Commission and the Virginia Attorney General do nothing more than underscore the widespread confusion among the lower courts regarding the definition of the "business of insurance" under the McCarran-Ferguson Act. Indeed, both opposition briefs mistakenly argue that Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), controls this case when in fact it is Section 2(a), *id.* § 1012(a), that is the controlling provision. Att'y Gen. Opp. 9; Corp. Comm'n Opp. 15; *see also Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 217-18 & n.18 (1979) ("The primary concern" of the McCarran-Ferguson Act—"assur[ing] that the States are free to regulate insurance companies without fear of Commerce Clause attack"—"is reflected in . . . [§] 2(a) of the Act"). The fact that the officials responsible for regulating insurance in the Commonwealth of Virginia are unable to identify the correct statutory provision for determining whether the McCarran-Ferguson Act shields a state law from the dormant Commerce Clause demonstrates the urgent need for this Court's review.

Respondents' efforts to mask this regulatory confusion and to reconcile the Fourth Circuit's holding with other courts' interpretations of the McCarran-Ferguson Act are wholly unavailing. When respondents' reliance upon irrelevant statutory provisions and superficial factual distinctions is properly discounted, it becomes apparent that the Fourth Circuit endorsed an unprecedented interpretation of the McCarran-Ferguson Act that directly conflicts with other circuits' decisions, that is at odds with this Court's precedent, and that has profound practical

implications for the multibillion-dollar viatical and life settlement industry as well as other industries that do business with insurance companies or insureds.

This Court's review is warranted to put an end to the "enduring problem" of defining the "business of insurance" under the McCarran-Ferguson Act.[1]

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT AND OTHER CIRCUITS' INTERPRETATIONS OF THE MCCARRAN-FERGUSON ACT.

Respondents attempt to obscure the conflict between the decision below and other courts' interpretations of the McCarran-Ferguson Act by arguing that the Act is inapplicable to this case—even though it is the only ground on which the Fourth Circuit's decision rests—and by attempting to draw factual distinctions between the decision below and other courts' McCarran-Ferguson Act jurisprudence. None of these efforts is persuasive.

As an initial matter, respondents contend that the McCarran-Ferguson Act is inapplicable to this case because a provision of the Internal Revenue Code, 26 U.S.C. § 101(g)(2), purportedly exempts state laws regulating viatical and life settlements from the dormant Commerce Clause's requirements. Corp. Comm'n Opp. 8; *see also* Att'y Gen. Opp. 10. The Corporation Commission concedes, however, that "[i]n order for a state law to be insulated from the dormant Commerce Clause, congressional intent to authorize the discriminating law must be either 'unmistakably clear' or 'expressly stated.'" Corp.

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[1] *Adams v. Plaza Fin. Co.*, 168 F.3d 932, 942 (7th Cir. 1999) (Easterbrook, J., dissenting).

Comm'n Opp. 9 (quoting *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984)). Section 101(g)(2) does not come anywhere close to meeting that standard. The statute provides only that the proceeds of a viatical settlement are excluded from the viator's taxable income if the viatical settlement provider "is licensed for such purposes . . . in the State in which the insured resides," or, "in the case of an insured who resides in a State not requiring the licensing of such persons," if the viatical settlement provider complies with certain requirements under the Viatical Settlements Model Act and Model Regulations. 26 U.S.C. § 101(g)(2). The statute's text provides absolutely no indication—and certainly falls far short of the requisite "unmistakably clear" or "expressly stated" authorization—that Congress intended to authorize States to regulate out-of-state viatical settlement providers without regard to the requirements of the dormant Commerce Clause. *See Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 163 (1985) (holding that Congress had authorized the enactment of discriminatory bank holding laws in a statute that explicitly afforded States the discretion to regulate and "authorize[ ]" interstate bank holding transactions). Indeed, Section 101(g)(2)—which appears to have been enacted in response to an I.R.S. decision treating the proceeds of a viatical settlement as taxable income (I.R.S. Priv. Ltr. Rul. 9443020 (July 22, 1994))—is not a grant of authority to the States at all, but rather an income tax provision that affords a tax benefit based, in part, on whether the taxpayer's State of residence has enacted a specific licensing regime.

Respondents next seek to distinguish those cases in which the Fifth, Sixth, and Eighth Circuits have

held that transactions between an insurer or an insured and a third party do not constitute the "business of insurance." Even though viatical and life settlements involve only the insured and a third party to the insurer-insured relationship, respondents contend that these cases are factually distinguishable from the decision below because a viatical or life settlement transaction "directly impact[s] the relationship of the insured person with the insurance company." Att'y Gen. Opp. 11; *see also* Corp. Comm'n Opp. 7.

The "direct impact" test proffered by respondents has never been recognized as a definition of the "business of insurance" under the McCarran-Ferguson Act. Indeed, whether or not respondents' self-serving description of viatical and life settlement transactions—which is supported by nothing more than citations to the decision below (*see*, *e.g.*, Att'y Gen. Opp. 2-3)—is accurate, there is no doubt that, in the cases respondents are attempting to distinguish, the transactions and relationships between insurers and third parties also had a "direct[ ] impact[ ]" upon the relationship between the insurer and the insured.

In *Genord v. Blue Cross & Blue Shield of Michigan*, 440 F.3d 802 (6th Cir. 2006), for example, the Sixth Circuit held that a statute regulating agreements between health insurers and health-care providers regarding reimbursement for services to policy holders did not pertain to the "business of insurance" under the McCarran-Ferguson Act (*id.* at 809)—even though the terms on which treatments are reimbursed has a direct impact on an insured, his relationship with the insurer, and the quality of benefits he receives under his insurance contract. Similarly, in *Prudential Insurance Company of America v. Na-*

tional Park Medical Center, Inc., 154 F.3d 812 (8th Cir. 1998), the Eighth Circuit held that the relationship between health insurers and health-care providers seeking to provide services to the plans' members was not the "business of insurance" (*id.* at 830)—despite the fact that the availability of health-care providers has a substantial and direct effect on insureds. *See also Liberty Glass Co. v. Allstate Ins. Co.*, 607 F.2d 135, 137 (5th Cir. 1979) (an agreement between an automobile insurer and a supplier regarding replacement glass for insureds' vehicles did not constitute the "business of insurance").

This same "impact[ ]" on "the relationship of the insured person with the insurance company" is evident in this Court's decisions holding that the McCarran-Ferguson Act does not extend to transactions involving third parties to the insurer-insured relationship. In *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), the Court held that agreements between an insurer and a third-party pharmacy regarding drug prices for insureds were not part of the "business of insurance" for McCarran-Ferguson Act purposes. *Id.* at 217. Similarly, in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982), the Court concluded that the relationship between an insurance company and a committee that advised the company whether an insured's chiropractic treatments should be reimbursed did not constitute the "business of insurance." *Id.* at 134. The Court reached these conclusions despite the fact that third-party agreements establishing the price that insureds must pay for drugs and the types of medical treatments reimbursable by an insurance company unquestionably exert a "direct[ ] impact[ ]" on the insurer-insured relationship.

Respondents' observation that transactions between insureds and providers of viatical and life settlements may have an impact upon the insurer-insured relationship therefore confirms that this case is *indistinguishable* from the third-party transactions that other courts—including this Court—have held not to constitute the "business of insurance" under the McCarran-Ferguson Act.[2]

Respondents are no more successful when they attempt to reconcile the decision below with the three-factor "business of insurance" standard established by this Court in *Pireno*. The Corporation Commission contends that all three factors are met in this case because a viatical settlement transfers a policyholder's risk by shifting the "risk" that the viator will live a long life to the viatical settlement provider, because the settlement "materially change[s] policy obligations and [is therefore] integral to the insured-insurer relationship," and because it is "aimed at entities operating within the insurance industry." Opp. 20-22 (emphasis omitted).

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[2] Contrary to the Corporation Commission's assertion (Opp. 25), the fact that the cases discussed above involved transactions between an insurer and a third party, while this case concerns a transaction between an insured and a third party, is completely irrelevant to the McCarran-Ferguson Act analysis. What matters for McCarran-Ferguson Act purposes is that *all* of these transactions involve a third party to the insurer-insured relationship. In the Fifth, Sixth, and Eighth Circuits, such transactions do not constitute the "business of insurance" because their "connection to the insurer-insured relationship is attenuated at best." *Prudential*, 154 F.3d at 830 (internal quotation marks omitted). As the decision below illustrates, in the Fourth Circuit, such third-party transactions can be part of the "business of insurance."

The Corporation Commission's application of each *Pireno* factor is flawed. *First*, a viatical settlement agreement does not spread the viator's risk because the possibility that the viator will live a long life cannot be deemed a "risk" to the viator, who is hoping to live a long life both after entering into the insurance agreement and after entering into the viatical settlement agreement. The only relevant risk to the viator is that he will die early, and that risk was spread to the insurer "at the time that the [insurance contract] [was] entered." *Pireno*, 458 U.S. at 130. *Second*, viatical settlements are not an "integral part" of the insurer-insured relationship because—like the transactions at issue in each of the cases from this Court and from the Fifth, Sixth, and Eighth Circuits discussed above—they involve only one party to that relationship. As this Court explained under analogous circumstances in *Pireno*, "Arrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at the center of [the McCarran-Ferguson Act's] legislative concern." *Id.* at 133. *Third*, Life Partners is not an entity "within the insurance industry." It is a licensed viatical settlement provider and, under Virginia law, is therefore prohibited from holding a license as an insurer. Va. Code § 38.2-6002(F).

Ultimately, nothing in respondents' briefs diminishes the conflict between the Fourth Circuit's expansive interpretation of the McCarran-Ferguson Act and the decisions of both this Court and other lower courts. Only this Court can authoritatively resolve these conflicts.

II. THIS CASE IS THE IDEAL VEHICLE FOR THIS COURT TO RESOLVE A PROFOUNDLY IMPORTANT QUESTION.

The extensive confusion generated by the McCarran-Ferguson Act extends not only to the definition of "business of insurance" under the Act, but also to the distinction between Sections 2(a) and 2(b) of the Act and to the relationship between the different clauses of Section 2(b). Indeed, the Corporation Commission concedes that, because the Fourth Circuit was unsure as to the correct standard to apply in this case, it "analyzed the facts under every possible approach under the McCarran-Ferguson Act" (Opp. 14)—concluding, alternatively, that the Virginia Viatical Settlements Act "relate[s] to the regulation" of the "business of insurance" under Section 2(a) of the Act (Pet. App. 27a), was "enacted 'for the purpose of regulating the business of insurance'" under Section 2(b) of the Act (*id.* at 30a), and, under a "'common-sense understanding[,]' . . . relates to or affects 'the risk pooling arrangement between the insurer and insured'" (*id.* at 22a).

This confusion about the scope and meaning of the McCarran-Ferguson Act is reflected in respondents' briefing. *See* Att'y Gen. Opp. 9 (treating this case as controlled by Section 2(b) of the McCarran-Ferguson Act). It is also evident from the lower courts' difficulties in applying the statute (*see, e.g.*, *Int'l Ins. Co. v. Duryee*, 96 F.3d 837, 839 (6th Cir. 1996)), and in this Court's own decisions (*see United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 512 (1993) (Kennedy, J., dissenting) ("The majority's broad holding is not a logical extension of our decision in [*SEC v. National Securities, Inc.*, 393 U.S. 453 (1969)] and indeed is at odds with it.")). Because the Fourth Circuit's decision construed both Sections

2(a) and 2(b) of the McCarran-Ferguson Act, this case provides the Court with the ideal opportunity to clarify each of these areas of confusion under the Act. In the course of determining whether the Virginia Viatical Settlements Act is shielded from the dormant Commerce Clause by the McCarran-Ferguson Act, the Court will have the opportunity to clarify whether Section 2(a) or 2(b) of the Act insulates state laws from the dormant Commerce Clause, the definition of the "business of insurance" under the Act, and whether that definition varies in different clauses of the Act. Each of these issues has generated significant confusion among lower courts and state regulators, and each warrants an authoritative answer from this Court.

Beyond this widespread legal and regulatory uncertainty, there are also compelling practical reasons for this Court to grant review. The Fourth Circuit's expansive interpretation of the McCarran-Ferguson Act authorizes Virginia to use discriminatory and unduly burdensome laws to regulate viatical and life settlement providers with virtually no connection to the Commonwealth. The extraterritorial application of Virginia law discourages out-of-state providers—who may be subject to overlapping and potentially irreconcialable regulatory requirements in other States—from doing business with individuals who reside in the Commonwealth and has dire implications for terminally ill and elderly policyholders who would be able to use the proceeds of a viatical or life settlement to pay medical bills and other essential expenses. *See* Br. of 60/Plus Ass'n, Inc. 3.[3]

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[3] The undisputed record below established that Jane Doe paid less than $100 in premiums for her life insurance policy, and sold the right to receive the death benefit for $29,900. C.A.

Although the Commonwealth certainly has the authority to enact laws designed to protect its residents from deceptive and oppressive business practices, the dormant Commerce Clause precludes the Commonwealth from applying those laws in a manner that unduly burdens interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This Court should grant review to ensure that the States do not invoke the McCarran-Ferguson Act as a basis for enacting parochial laws that regulate business activities that do not even remotely constitute the "business of insurance."[4]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

[Footnote continued from previous page]

J.A. 366-67. She could not have realized this sizable profit if Virginia law had been applied to her out-of-state transaction.

[4] Respondents devote pages of irrelevant argument to the merits of Life Partners' dormant Commerce Clause challenge—an issue that the Fourth Circuit did not reach. Att'y Gen. Opp. 15-22; Corp. Comm'n Opp. 29-31. Whatever the strength of Life Partners' case on the merits—and, in light of the near-total absence of Virginia connections to the transaction between Life Partners and Jane Doe, there is a strong basis for concluding that the Virginia Viatical Settlements Act violates the dormant Commerce Clause as applied to Life Partners—the Fourth Circuit's expansive interpretation of the McCarran-Ferguson Act will remain on the books in the absence of this Court's review. Even if respondents were ultimately to prevail on the merits on remand from this Court, there is a compelling reason for this Court to grant certiorari in order to reconcile the Fourth Circuit's decision with this Court's McCarran-Ferguson Act jurisprudence and to alleviate the pervasive confusion that the Act has fostered among courts and regulators.

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IN THE

Supreme Court of the United States

Life Partners, Inc., Petitioner

v.

THEODORE V. MORRISON, JR., MARK C. CHRISTIE, and JUDITH WILLIAMS JAGMANN, in their official capacity as the Commissioners of the State Corporation Commission, and ALFRED W. GROSS, in his official capacity as the Commissioner of Insurance, and ROBERT McDONNELL , in his official capacity as the Attorney General of the Commonwealth of Virginia, Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR *AMICUS CURIAE* 60/PLUS ASSOCIATION, INC. IN SUPPORT OF THE PETITIONER

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October 29, 2007

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INTEREST OF *AMICUS CURIAE*

60/Plus Association, Inc. (60 Plus) is a non-stock, tax-exempt research and educational corporation qualified under United States Internal Revenue Code Section 501(c)(4). 60 Plus was founded as a seniors advocacy group with a free enterprise, less government, less taxes approach to seniors' issues[1].

The interest of 60 Plus in this case stems from its goal of educating seniors and their families about the virtues of a free-market, property-rights oriented future for seniors and their families. To further its mission, 60 Plus maintains a website[2] entitled *60plus.org,* which contains links to a variety of educational materials and articles; its staff prepares analyses, position papers, opinion-editorials and a variety of other materials promoting the 60 Plus agenda; and officials from 60 Plus regularly appear before congressional committees and interact with government officials, journalists and academics.

Allowing seniors to freely exercise their ownership rights in *their* personal property is a paramount concern for 60 Plus, for seniors and for their families. Advocacy for expanding these freedoms marbles throughout the agenda of 60 Plus. When those rights are regulated to the point that they are effectively denied, then seniors and their families

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[1] The parties to this proceeding have filed with the Clerk of the Court blanket consents to all *amicus curiae* briefs. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than the amicus curiae, its members or its counsel has made monetary contribution to the preparation or submission of this brief.

[2] The webs site may be found at **http://www.60plus.org**.

lose. This case presents a stark example of the effective destruction of a basic property right – here, a senior's right to sell his or her life insurance policy – by the heavy hand of well-intended but wrong-headed regulation of the market place. This litigation therefore cuts to the core of the interest of 60 Plus in promoting a free-market agenda for seniors.

SUMMARY OF ARGUMENT

This case involves state regulation of the secondary life insurance market, and whether – and to what extent - a state may regulate such transactions between in-state policy holders who wish to sell their policy (sellers) to out-of-state purchasers. The Commonwealth of Virginia contends that the McCarran-Ferguson Act (15 U.S.C. §§ 1011 *et seq.*) (the Act) permits it to impose its regulatory scheme on every transaction in the secondary life insurance market, even those arranged at the request of the seller by out-of-state agents on behalf of out-of-state purchasers, as long as the seller is a Virginia resident, no matter that a transaction may be (and likely is) subject to regulation in the agent's and purchaser's state of residence. Petitioners have demonstrated that Virginia's interpretation of the Act significantly burdens and threatens to destroy the secondary life insurance market. The Fourth Circuit, in a needlessly expansive and unprecedented reading of the Act, agreed with Virginia. In the face of conflicting authority in other Circuits and contrary authority from this Court, 60 Plus joins with Petitioners in urging the Court to review the decision of the Fourth Circuit.

ARGUMENT

Virginia's statute, the Virginia Viatical Settlements Act (Va. Code §38.2-6000, *et seq.*) affects more than only the terminally ill. Others, too, have an interest in selling existing life insurance policies to meet a variety of needs. Doherty and Singer, *The Benefits of a Secondary Market For Life Insurance Policies*, 38 Real Prop. Prob. & Tr. J. 448 (2003). For example, policy holders who can no longer afford the premiums or policies that are no longer necessary. (*Id* at 453). These situations generally involve policy holders who no longer require the policy for the reason that it was originally purchased, but they recognize that surrendering it for a low cash value or allowing the policy to lapse devalues the asset.

In this case, the notion that a policy owner is free to sell his or her asset in the open market is undermined by a state law that, in the name of consumer protection, dictates prices at levels in excess of those that the market dictates. The foreseeable result is that buyers will go elsewhere – to states that have not set irreducible prices – and Virginia sellers will lose the practical ability to sell to those they select. Their only real choice will be to deal with the issuer of the policy. Knowing that the seller has no real alternative to surrendering the policy to the issuer, the issuer (who is not bound by the strictures of Virginia's Viatical Settlement Act) is not likely to give the seller a fair price for his or her policy. In short, Virginia sellers will not be able to reap the benefits of a bargain made I the open market. That is an unacceptable burden on interstate commerce.

The burden of Virginia's statute is not only heavy and one-sided, it is far-reaching as well. By its terms, the

Virginia law purports to reach *all* transactions involving in-state sellers, even if those that involve out-of-state buyer or buyers and their agents, even if the transactions are completed out-of-state, and even if they are subject to other states' regulatory schemes. Because the Virginia Viatical Settlement Act imposes such a heavy burden on sales through the secondary life insurance market, that market has been diminished and as a consequence, the value of the life insurance policies of those Virginia residents who want to sell them has been reduced. In a well-intentioned but ill-advised stab at consumer protection, Virginia has effectively choked off the secondary market for Virginia sellers – who are oftentimes seniors in poor health.

The record evidence set out in the Petition proves the point. Petitioner's expert testified that the transaction at issue in this case would not have taken place under the Virginia Act's minimum price requirements. C.A.J.A. 223. It is Virginia's over-regulation – together with other requirements under Virginia law that impose duplicative and costly regulatory/administrative burdens – that unduly burdens interstate commerce and all but shuts out access to the secondary market for Virginian sellers. These burdens, and the resultant lost opportunity to Virginia seniors, are at the core of 60 Plus's concern.

CONCLUSION

On behalf of its members across the United States, 60 Plus respectfully submits this brief as *amicus curiae* in support of the Petition for a Writ of Certiorari of Life Partners, Inc and, upon all of the grounds set forth in Rule 10, asks that *certiorari* be granted.

Respectfully Submitted,
60/Plus Association, Inc.,
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